From the Law Offices of
JOHN N. MOHR
Hall Bldg., Hood River, Ore.

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

FRANK A. TURNER
REPORTER

VOLUME 85

DECISIONS BETWEEN JULY 3, 1917, AND OCTOBER 16, 1917

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JUDICIAL DISTRICTS AND CIRCUIT JUDGES

IN THE

STATE OF OREGON

October 16, 1917.

First Judicial District—

Jackson, Josephine — FRANK M. CALKINS, Medford.

Second Judicial District—

Benton, Douglas — JAMES W. HAMILTON, Roseburg.

Curry, Coos — JOHN S. COKE, Marshfield.

Lane, Lincoln — GEORGE F. SKIPWORTH, Eugene.

Third Judicial District—

Linn — PERCY R. KELLY, Department No. 1, Albany.

Marion — GEORGE G. BINGHAM, Department No. 2, Salem.

Fourth Judicial District—

Multnomah —
- JOHN P. KAVANAUGH, Department No. 1, Portland.
- ROBERT G. MORROW, Department No. 2, Portland.
- ROBERT TUCKER, Department No. 3, Portland.
- GEORGE N. DAVIS, resigned August 29, 1917, and GEORGE W. STAPLETON, appointed, Department No. 4, Portland.
- WILLIAM N. GATENS, Department No. 5, Portland.
- CALVIN U. GANTENBEIN, resigned August 29, 1917, and EDWIN V. LITTLEFIELD, appointed, Department No. 6, Portland.

Fifth Judicial District—

Clackamas — JAMES U. CAMPBELL, Oregon City.

Sixth Judicial District—

Morrow, Umatilla — GILBERT W. PHELPS, Pendleton.

Seventh Judicial District—

Hood River, Wasco — FRED W. WILSON, The Dalles.

Eighth Judicial District—

Baker — GUSTAV ANDERSON, Baker.

Ninth Judicial District—

Grant, Harney, Malheur — DALTON BIGGS, Ontario.

Tenth Judicial District—
Union, Wallowa } JOHN W. KNOWLES, La Grande.

Eleventh Judicial District—
Gilliam, Sherman, Wheeler } DAVID R. PARKER, Condon.

Twelfth Judicial District—
Polk, Yamhill } HARRY H. BELT, Dallas.

Thirteenth Judicial District—
Klamath.....DELMON V. KUYKENDALL, Klamath Falls.

Fourteenth Judicial District—
Lake.....L. F. CONN, Lakeview.

Eighteenth Judicial District—
Crook, Deschutes, Jefferson } T. E. J. DUFFEY, Prineville.

Nineteenth Judicial District—
Tillamook, Washington } GEORGE R. BAGLEY, Hillsboro.

Twentieth Judicial District—
Clatsop, Columbia } JAMES A. EAKIN, Astoria.

DISTRICT ATTORNEYS

IN THE

STATE OF OREGON

October 16, 1917.

County.	Name.	Official Address.
Baker	Levens, W. S.	Baker
Benton	Clarke, Arthur	Corvallis
Clackamas	Hedges, Gilbert L.	Oregon City
Clatsop	Erickson, J. O.	Astoria
Columbia	Metsker, Glen R.	St. Helens
Coos	Hall, John F.	Marshfield
Crook	Wirtz, Willard H.	Prineville
Curry	Buffington, Collier H.	Gold Beach
Deschutes	DeArmond, H. H.	Bend
Douglas	Neuner, George, Jr.	Roseburg
Gilliam	Weinke, T. A.	Condon
Grant	Ashford, Phil	Canyon City
Harney	Biggs, M. A.	Burns
Hood River	Derby, A. J.	Hood River
Jackson	Roberts, G. M.	Medford
Jefferson	Boylan, Bert C.	Metolius
Josephine	Miller, W. T.	Grants Pass
Klamath	Duncan, William M.	Klamath Falls
Lake	McKinney, T. S.	Silver Lake
Lane	Ray, L. L.	Eugene
Lincoln	Hawkins, Calvin E.	Toledo
Linn	Hill, Gale S.	Albany
Malheur	Swagler, R. W.	Malheur
Marion	Gehlhar, Max	Salem
Morrow	Notson, Samuel E.	Heppner
Multnomah	Evans, Walter H.	Portland
Polk	Piasecki, E. K.	Dallas
Sherman	Huddleston, C. M.	Wasco
Tillamook	Goyne, T. H.	Tillamook
Umatilla	Keator, R. I.	Pendleton
Union	Hodgin, John S.	La Grande
Wallowa	Fairchild, Abijah	Enterprise
Wasco	Galloway, Francis V.	The Dalles
Washington	Tongue, E. B.	Hillsboro
Wheeler	Starr, J. K.	Fossil
Yamhill	Conner, Roswell L.	McMinnville

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In Memoriam

HON. ROBERT EAKIN, LATELY A JUSTICE OF THIS COURT.

On the 6th day of November, 1917, came a committee of the Oregon and Multnomah Bar Association, and on behalf of the Bar of the State of Oregon presented to the Supreme Court of the State of Oregon the following report and resolutions:

We, members of the Bar of the Supreme Court of the State of Oregon, moved by our high regard for the character and public services of Mr. Justice Robert Eakin, who departed this life on the first day of October, 1917, have met at Salem, this 6th day of November, 1917, for the purpose of discharging what we regard as a high public duty in honoring the memory and recording our estimate of one who, as a man, a citizen, a lawyer and a judge has greatly enriched the profession and honored our State. We present the following:

Robert Eakin was born on March 15, 1848, in Elgin, Illinois. He was a son of Stewart B. and Catherine (McEldowney) Eakin. His early life was passed partly at Elgin and partly at Bloom, Illinois, where he attended the public schools.

With his parents, he came to Oregon in 1866. He entered Willamette University at Salem and was graduated in 1873. He studied law in the office of Hon. Geo. B. Dorris at Eugene, Oregon, in 1873–74, and was admitted to the Bar of this court in 1874. On June 21, 1876, he was married to Mary Walker, who survives him.

He entered upon the practice of his profession at Union, Oregon, immediately after his admission to the Bar, and continued until March, 1895, when he was appointed by Governor William P. Lord, Judge of the Circuit Court for the Eighth Judicial District. He was elected to this office in 1896, re-elected in 1902, served until 1906, when he took his seat upon the bench of the Supreme Court by virtue of the votes of the people, to which position he was again elected in 1912, continuing in the service of the state until 1917, when he laid the ermine down, due to the insidious effects of the disease which later claimed his life.

Justice Eakin's home life was an uninterrupted period of mutual love and comfort. To this home there came five children, namely: Ethel, who died in infancy; Georgia B., who died in early womanhood; Robert S., of the law firm of Crawford & Eakin, of La Grande, Oregon; Gertrude and Harold Eakin, of Salem, Oregon, the latter being now with the Ladd & Bush Bank of Salem, Oregon. His wife, and brothers Herbert Eakin of Cottage Grove, Oregon; Walter J. Eakin of Astoria, Oregon; Judge James A. Eakin of Astoria, Oregon; and sister, Mrs. Calvin Hannah of Eugene, Oregon, and Mrs. Catharine McQueen, of Portland, Oregon, survive him.

Early in his life he became a member of the Presbyterian Church. He organized a Sunday school at Union, Oregon, shortly after his arrival in 1875, and was continuously its superintendent for twenty-nine years. In the church he was an active member serving many years as elder and in other ways in the consecrated and devoted service to his Master. His religion was not ritualistic and formal, but a deep, conscientious conviction and well illustrated by his daily life.

As a man, Justice Eakin was modest, plain and unassuming. He abhorred that which was evil and cleaved to that which was good. He was a man of great kindness, charity and sympathy. He honored, revered and respected the courts before whom he practiced and by his manner of life claimed the friendship and respect of his brethren of the Bar. He loved music. He loved to sit in the enchanted circle of home, surrounded by his family and friends and listen to the "concord of sweet sounds" from the hallowed Gospel tunes, telling of Christian faith and hope, to the majestic overtures, rhapsodies and symphonies of the masters rendered by those of his children who survived childhood.

As a lawyer, he was devoted to the interests of his clients. His arguments were profound and logical and his conclusions were reached only after studious research among principles and precedents. He shared the formative period of our judicial history, participating in many cases involving principles of law "as a matter of first impression."

As a judge, he was patient, courteous, dignified and firm. He brought to the bench a ripe experience, gathered from a busy professional life, relating to the numerous and varied legal principles, the application of which to the industrial development of this state have been so vital and essential to the general welfare.

His opinions have enriched the judicial literature of the profession, rarely containing dicta. His style was simple, direct and forceful. His judgments were tempered with mercy and he always kept in mind a court's great objective,—that decision must harmonize with the will of the law and not the will of the judge.

He was loyal to the law. He had no peculiar economic views requiring artificial distinctions and spe-

cious analogies whereby to modify the fundamentals of our jurisprudence.

As members of the Bar of a great state and at a time when the enemies of liberty and freedom are thundering at the citadels of democracy we may well ponder and memorialize the life of a just judge, who loved justice, who loved freedom and liberty and who served with an untarnished name—a great state in a great country.

Such a man we assert Mr. Justice Robert Eakin to have been, and the world bettered by his life.

By these standards which constitute his just title to the esteem of his fellow-citizens, we say Justice Eakin is worthy of lasting commemoration in the annals of this court and state.

THEREFORE BE IT RESOLVED, by the Bar of the Supreme Court of the State of Oregon that in the death of Mr. Justice Robert Eakin the people have lost a conscientious advocate and the Bench a just and generous judge. To the family we extend our sympathy in their bereavement. That a copy of these proceedings be sent to Mrs. Eakin, and that they be spread upon the minutes of the Supreme Court of the State of Oregon and published in its reports.

T. H. CRAWFORD,
J. W. KNOWLES,
CHAS. H. CAREY,
W. T. SLATER,
CHARLES L. MCNARY,
Committee Oregon Bar Association.

CHARLES E. COCHRAN,
CHARLES A. JOHNS,
J. P. KAVANAUGH,
JOHN MCCOURT,
EVERETT A. JOHNSON,
Committee Multnomah Bar Association.

Judge THOS. H. CRAWFORD:

It is but fitting and proper in moving the adoption of these resolutions that I speak briefly of our de-

ceased brother. From 1878 to 1907 we lived as neighbors in the same town, interested in the growth and development of each other's family, and we associated with each other almost daily. From 1878 to 1895 we practiced law at the same Bar, being associated together in many important cases. At first neither of us knew much law, nor how little we did know, but we were ambitious to succeed and rise in our profession. At that time we were both young and about the same age. He was born on the 15th day of March, 1848, and I was born on the 19th of March, 1848—just four days difference. From 1895 to 1907 he occupied the circuit bench of our district and his constituents appeared before him in the trial of cases. In his practice at the Bar he never for a moment lost sight, even in the most heated controversy, of the ethics of the profession. He was always courteous to his associates and treated all with whom he came in contact alike. He prepared his case for trial with care and presented his cause with ability, and ever kept inviolate the confidence of his client. He never forgot his duty to the end. As a trial judge he heard both sides with patience, never interrupting an attorney in presenting his side of the case, and it was only after due deliberation, when his mind was firmly made up, that he announced his decision without comment, then stood firmly by his guns. In passing sentence upon parties convicted of crime he exercised much charity, looking to reformation rather than to punishment. His decisions handed down from the Supreme Court speak for themselves. They constitute an imperishable monument to his memory.

As a neighbor he was all that one could wish; as a husband and father he reached the highest level; as a Christian he was devoted to his church, and endeav-

ored to uplift and better humanity. He never imposed upon one by word of mouth his religious views, but he let his acts and his conduct and his daily life with his fellow-men show his religion. Perhaps the most prominent characteristic of Judge Robert Eakin was his extreme patience and self-control. I never saw him, even under the most trying ordeal, lose his patience or utter a hasty thought or word. I have seen him under extreme provocation turn almost white in the face with anger, but he would close his mouth, bite his lips, patiently wait until his temper had cooled, and then calmly but firmly dispose of the matter in hand; a splendid monument to his memory; a splendid example to his children. In his death, not only his family and relatives, but the entire Bar of the State, this court, and the whole people of the State have sustained a great loss. The world is better—*much* better, I think—for Judge Robert Eakin having lived in it.

Mr. C. E. COCHRAN:

May it please the Court, since death has claimed Mr. Justice Eakin and the Bar has met in this courtroom, the scene of his last labors, I desire to add in support of the resolutions just read that while I firmly believe that the people of the State of Oregon have lost one of their great men, yet I know that I have lost one of my most esteemed and best of friends. I came to know Judge Eakin when a boy on an Eastern Oregon farm, he a young lawyer who had but just begun his career. His own activity at the Bar and the universal esteem in which he was held by the people of that part of the State was largely the inspiration which later led me to seek and prepare and apply for admission to the profession which his life and char-

acter have so greatly enriched. For a few months immediately prior to his taking his seat on the *nisi prius* bench I was at the same Bar with him: I a raw recruit; he a seasoned veteran. My first case was lost to him in an endeavor upon my part to secure by judicial legislation the repeal of the statute of frauds. Later I was an attorney before the court on which he was judge, and for more than twenty years he pronounced the judgments in instances in which I was one of the advocates. The resolutions read are a word picture of his life and character. Judge Eakin's home life was especially beautiful. His was an ideal American home. He was a Christian gentleman. Whether in the sanctum of the home at family prayer, in the lawyer's office, or on the bench, he always observed an attitude containing all of the cardinal virtues. Judge Eakin assisted me very much in the first years of my practice. His words of encouragement were exceedingly helpful. His suggestions of accuracy in the preparation of documents, court papers, and journal entries laid the foundation upon which I subsequently builded. He was a quiet man, of simple tastes and habits, and of strict integrity, sobriety and probity. Judge Eakin was studious and many of his victories at the Bar as well as of his opinions on the bench were taken from the depths of the law by profound investigation and research. He brought to the bench a dignity and justice befitting the office. He was patient and attentive and at all times kept control of himself, of the court, the attorneys and the jury. I have seen occasions in his court when the uncertainty of the trial involved life or death, the hangman's noose, or the prison cell, when the earnestness of respective counsel resulted in a condition which taxed his patience to the limit, by his sagacity and

wisdom and dignity and firmness he directed the trial without losing the confidence of counsel or of his constituency. He carefully observed all the matters necessary to the conduct of his office and controlled by his demeanor on the bench the affairs of all those having business with the court. He was not an orator or a rhetorician, but his style and manner were plain, forceful and concise: his arguments were brief and logical. And he proceeded from one station to another in his course, until the conclusions became plain and self-evident; he was admitted to the high standard maintained and occupied by the judges of this court in support of the great cause of human justice. As a humble member of the Bar, and as a friend of many years to the one whose life and character we honor today, I assert that we do well to ponder upon the life of the deceased jurist that we may take from it fresh incentives and inspirations to be true to the superlative ethics of our profession, and always to remember the honorable part they have played in the happiness of mankind.

By Judge MORELAND:

If the court please, Mr. Cotton was expected to be here this morning and make one address. He was unable to attend and sends this telegram: "I regret that I am unable to attend the meeting. Robert Eakin was an earnest advocate, a fearless opponent, and a strong judge. He impressed me during the twenty-seven years that I knew him by his staunch spirit and by his fairness toward all with whom he came in contact. The State and Bar has suffered a great loss.

"W. W. COTTON."

Judge W. T. Slater:

My first impressions of the character and personal qualities of Robert Eakin were of a traditional nature, but later impressions were the result of a close personal contact with him, while acting as one of the justices of this court. The later associations confirmed and established in my mind the certitude of that high and honorable esteem in which I had learned Judge Eakin was held by all the people of Union County, among whom he had lived for many years.

Union County is the place of my boyhood home. At the time that Robert Eakin came to that county to establish himself in the practice of the law, the county was sparsely settled and the towns or villages were small. Anyone who had been there very long knew and was known by all of the rest of the residents of that locality; so that when a stranger came to settle in our midst, the fact of his having come and the object of his coming were soon known to all of the settlement. I was a mere boy of some sixteen or seventeen years when Robert Eakin came to the town of Union in Union County as a young lawyer to practice his profession. Although that town was some eighteen miles distant from the town of La Grande where my parents lived, still I learned forthwith that Robert Eakin, a young man of some pretensions to learning and judicial ability, was starting as a lawyer at Union. This knowledge probably came about because my father was then a prominent member of the Bar of that county. Robert Eakin soon established himself as entitled to be listened to when it came to a discussion of the law.

In about a year after this young lawyer had come to Union, it became a matter of neighborhood talk that he was soon to return to the Willamette Valley for a

visit and was to bring back with him a wife. I remember of knowing about the time of his anticipated return and of watching daily the coming of the overland stage from the West, which turned the corner of my father's lot as it entered Main Street of the town, so as to be at the station at the heralded coming. So I, an uncouth lad, was at the hotel of the town, the stopping place for the stage, when the young lawyer, Robert Eakin, came back with his bride. Many others of the town were also there. Mrs. Eakin was on the front boot on the outside of the stage, and when the stage was stopped she was gracefully assisted to the platform by the station agent, while Robert later emerged from the interior of the stage, smiling to the limit while he shook off the accumulated dust, and received the congratulations of his friends.

I left Union County in the fall of 1879 to attend college and did not come into close acquaintanceship with Judge Eakin until early in the year 1907, when I accepted an appointment as one of the commissioners of this court of which Judge Eakin was then a member. Then it was that I began to know Judge Eakin intimately, to know that the good reputation for integrity, industry and ability, which he had early established among the people of Union County and which had expanded to the limits of this state, was well earned and justly given. He was not at all effusive in his personal attentions to friends, but he had a warm, honest and generous heart. He was scrupulous and exact in his judicial reasoning, and he stated his conclusions in a brief and unostentatious manner.

During a companionship with him on this court, through a term of four years, I had learned to respect and to honor Judge Eakin for his sturdy integrity of purpose and character, for his ability as a judge and

to love him as a true friend. He died, as all of us might wish to die, with the friendship and love of all who knew him.

Senator Charles L. McNary:

Mr. Chief Justice and Your Honors: A few minutes ago I was asked to say a word on this occasion. I shall not speak of the legal attainments or of the judicial career of Justice Eakin, because the record which he left in the jurisprudence of the State sufficiently attests his fitness in those fields of labor. I shall speak briefly of the personal qualities of the deceased jurist. It was my happy privilege to serve about twenty months with Justice Eakin in this Court. I was associated with him in Department No. 2 shortly after the court organized under the laws of 1913. That association permitted me to observe the many exemplary qualities possessed by Justice Eakin. I came here unschooled, and untaught in the ways of the courts. I knew nothing of the judicial intricacies that control the conventional actions of the courts. I found Justice Eakin a most helpful associate. To me he was exceedingly kind and thoughtful. He was anxious to aid me and in every way willing to give me his best thought, which he often did. I found the road to Justice Eakin's sympathies was broad and unobstructed, and anyone who desired assistance from Justice Eakin, found this road accessible and inviting. To all his friends he was kind, cordial and true, and he left behind him the greatest of all monuments—a spotless name. It is a pleasure to me to briefly give a word in praise of one whom I loved and for whom I entertained a most exalted and affectionate feeling.

Mr. RINEHART:

If it please the court, I was asked after arriving at the Supreme Court Building to talk for a little while on the life of Judge Eakin, but I have not had time to prepare and arrange my remarks to address this venerable court this morning. Like some of the other speakers who have preceded me, I have known Judge Eakin from boyhood. Like my esteemed friend who has just vacated the floor I knew him when I was a boy of fourteen years. My first experience with him was in a little schoolhouse, about twelve miles from the town of Union, where a case was being tried wherein a young man had severely beaten an aged gentleman of the community, and as I happened to be in that locality visiting, I attended the trial in the little schoolhouse, known as "Hardscrabble." And I remember him because having been raised on the frontier I had seen but very few lawyers. Outside of George B. Dorris, of Eugene, ex-Senator James H. Slater, of La Grande, and Cage Baker, of La Grande, I do not believe I had seen an attorney to know him until that day. Judge Eakin was then a tall young man of sober mien and careful speech, and he stood there and discussed this matter with the justice, who knew about as much law as most of the beginners in law know, maybe not so much as they do, but I remembered him, and from that day until this it has been my privilege to watch his uprisings and his sittings down and his movements in and out before men.

Tribute has been paid to Judge Eakin by men and minds that knew him well. They understood his character and his ambitions in life, and they have appraised his worth today as an attorney and as a judge, and some of these gentlemen knew him far better than

I; but as a man, if you please, as a man who has exerted an influence in the world, I believe I was as closely allied to Judge Eakin as any who have spoken here today, and I, therefore, insist that the memory of Judge Eakin should and will be kept green in the memory not only of this court and of this Bar, but of the people of the generation in which he lived and moved and worked. A lawyer battles usually in the realm of the law, a minister studies and develops himself in the line of ecclesiastics, but Judge Eakin, whom I am proud today to call my friend, wrought not only in his professional life, but he wrought for good among the men and women with whom he moved; and as on an occasion previous to this, in speaking of monuments that had been placed to the memory of men of war, I recalled the name of Caesar, of Hannibal, and of Napoleon, and realized that great monuments had been built in the world to perpetuate their memory, but our mutual friend has builded a monument in the hearts of a grateful people. He will be remembered, not only as a lawyer and a judge, but will live in the memory of this generation as that of a man, who has exercised an influence upon his fellow-men, a man in whose footsteps many a young attorney may have trodden feeling safe and secure in following one of such a highly developed character. A member of this court told me today that he believed that Judge Eakin died a martyr to his profession. He believed that the hard work that he did in the Supreme Court caused his early death. That may be true, but yet he was a man of extensive interests, a man who went forth in the world doing his duty, not only as a lawyer, but, as I said before, as a Christian gentleman, exerting his influonce to benefit not only the community in which he lived, but the whole body politic of the State of Ore-

gon. We remember his campaigns which were fair, honest and straightforward. We say that it is hard for a politician to keep in the straight and narrow way, but no one in the State of Oregon has or will accuse Judge Eakin of violating any one of the laws of honesty or uprightness or question his actions in the line of politics. Then I say to you that the greatest monument that will be built to his memory has been builded already in the hearts of the people of the State of Oregon.

Chief Justice McBRIDE:

Gentlemen of the Bar: The death of Justice Eakin is so much a personal bereavement to the members of this court that it is difficult for me to respond to the resolutions that have been presented and the eloquent eulogies that have been pronounced in honor of his memory. I should have preferred that that duty had been left to someone better qualified for the task, but at the request of my associates and as their spokesman, and expressing as well my own feeling of regard for our deceased brother, I shall try, without attempt at eloquent phrase, but in the language of a sincere friend and mourner, to express the sorrow of Justice Eakin's former associates at his untimely death. I use the word "untimely" not with reference to his age, for like myself he was nearing the "three score years and ten" which the sacred writer fixes as the normal limit of human existence, but I use it with reference to the need of the world for men of his capacity, steadfastness and integrity; men who like him are a beacon light in this busy, self-serving world; men who like him are able to "Stand four square to all the winds that blow"; men firm and tenacious of their strong purpose. The death of such a man, whether

in middle or old age, is always untimely. Affection or sometimes vanity rears to the memory of the departed monuments of marble or granite, but a man's best and noblest monument is the life that he has lived, the work that he has done, the good that he has accomplished for humanity; and by this test the monument of our deceased brother looms large. His distinguished trait was devotion to principle; his creed of creeds was a desire to be helpful to humanity. It was my rare pleasure to know him well. When I came to this bench, nearly nine years ago, I found Judge Eakin here. We were of like age, both reared under Western conditions, and both had encountered similar pioneer privations. It was natural under the circumstances that our social relations should be intimate. The law at that time was in a state of flux owing to the adoption of recent constitutional amendments which gave rise to new and difficult questions in the decision of which we were frequently without precedent. Judge Eakin was naturally somewhat conservative, while the bent of my own mind inclined to radicalism, perhaps to some extent because I had taken part in the preparation of the new measures and assisted so far as my time and abilities went in promoting their adoption by the electorate. In him I found a valuable and safe counselor. While he believed and acted upon the principle of "making haste slowly," and was cautious in arriving at conclusions, it was noticeable that he never allowed his preconceived opinions as to the wisdom or policy of a law to sway him in the interpretation of it. He "hewed to the line" as he understood the line to be defined. He was loyal to the law. As a lawyer, Judge Eakin was a clear and logical reasoner and abundantly prepared by previous study. He was an indefatigable worker, allowing himself

little relaxation from his judicial studies—too little, far too little. It is my candid opinion that the physical breakdown resulting in his death can be traced directly to his overwork as a judge of this court. The eye of friendship noted his declining health before it became apparent to the general public, and he was urged to take a rest; but the work was here to be done and he faced it as a soldier faces death in the trenches. May we all, bench and Bar alike, be as faithful servants of the law as was Judge Eakin.

The high esteem in which he was held by the profession is evidenced by the resolutions and eulogies here pronounced. His opinions in the Oregon Reports will stand as a monument of his industry, ability and desire to do absolute justice according to law.

Judge Eakin did not allow his zeal in the administration of the law to distract his attention from the duties which every man owes to the community of which he is a citizen. His political views were clear-cut and decided, and he took an active interest in the success of his party at the polls, but there his partisanship ended. Nobody ever discovered a trace of it in his judicial action. He was a zealous worker in the cause of temperance, though inclined to be conservative in his interpretation of statutes bearing upon that subject. He was modestly, sincerely and truly religious, regular in his attendance at the services of his church, and a worker in the Sunday schools. We frequently discussed matters pertaining to religion, he holding to the faith of the most rigid of denominations, while I to one having no written creed, but as he once said, and it showed his tolerant disposition, "We are all traveling to the same goal, but by different roads."

Socially he was the most genial of companions, not hasty to make new friendships, but his friendship once

given was as constant as the needle to the pole. It was a dependable quantity, ready to manifest itself as the occasion might require.

In his family he was all that a husband and father should be—devoted, indulgent, kind. While the bench has lost an able and upright jurist, the Bar a man who honored it by being one of its members, and society a useful citizen, the greatest loss falls upon the bereaved family which he so tenderly loved. There is little of this world's consolation that we can offer them. That may only be found in consideration of the splendid record that he has left behind him and in a belief in a future state of eternal happiness—a faith in which he lived and died.

Gentlemen, the resolutions offered by your companions will be received and placed upon record, and a copy forwarded to his family. And as a further mark of esteem, court will stand adjourned for the day.

CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON.

Argued May 22, affirmed July 3, 1917.

HUBBARD *v.* SCOTT.*

(166 Pac. 33.)

Libel and Slander—Disparagement of Property of Another—Slandering Business.

1. Language which does no more than to disparage the property of another or the quality of the articles which he manufactures or sells is not actionable unless special damages are alleged and proved; but, if the language disparaging the property of another also involves an imputation upon him in respect to his trade, business, or profession, then the language becomes actionable *per se*, and it is unnecessary to allege or prove special damages.

Libel and Slander—Slander of Business.

2. Words to be actionable as slandering a person's business must touch the person in his business, and must impeach either his skill or knowledge, or attack his conduct therein.

Libel and Slander—Slander of Business—Sale of Land.

3. Assuming that plaintiff's attempt to sell a tract of land was a business, a statement of another that they had no right to sell it was not actionable as a slander of such business, because the statement did not impute dishonesty or deceitfulness, or that they lacked capacity or skill, or that they were violating any law in pursuit of the alleged business.

[As to disparagement of property or of manufactured articles as libel or slander, see note in **Ann. Cas.** 1914D, 1151.]

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*For a discussion of the question of disparaging quality of goods sold or manufactured as libel or slander, see note in 48 **L. R. A. (N. S.)** 1214.

For authority passing on the question of necessity of proving special damages in an action for slander of title, see note in 13 **L. R. A.** 707. REPORTER.

Libel and Slander—Slander of Title—Option Holders.

4. Option holders, although not owning the land, have such an interest as entitles them to damages from any person slandering their title.

Libel and Slander—Slander of Title—Option Holders.

5. If the owner of land falsely and maliciously stated that his contract of option to plaintiffs had expired and that they had no rights thereunder and no right to engage in selling and disposing of the land, he was guilty of slandering plaintiff's title.

Libel and Slander—Slander of Title—Special Damages.

6. Plaintiff in action for damages for slander of title must allege and prove special damages, and it is not enough merely to allege generally that he intended to sell to any person who might buy, but he must allege and prove the loss of sale to some particular person; the loss of sale to some particular person being the special damage and the gist of the action.

Libel and Slander—Slander of Title—Damages.

7. In action by option holders against the owner giving the option for slander of their option title by a statement that the option had terminated, plaintiffs could not recover expense of attorney's fees in defense of a prior suit by the owner to forfeit the option; for, although the fees fixed by statute and technically known as costs did not furnish full compensation, the decree awarded in the prior suit is supposed to have adjudged to the prevailing parties all sums to which they were entitled for expenses therein incurred.

From Jackson: GEORGE F. SKIPWORTH, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

This is an action for damages. William Scott and A. B. Saling signed a writing for the sale of 1,365 acres of land owned by Scott. For the sake of convenience the writing will be designated as an option. It is dated December 31, 1908, and, so far as it is material here, reads thus:

"I, William Scott * * in consideration of fifty dollars paid monthly in advance to me in hand paid by A. B. Saling, do hereby agree to sell and convey to said A. B. Saling, or unto his heirs, assigns and legal representatives, the following described property. (Describing it.)

"It is expressly understood and agreed that the said William Scott reserves all coal, oil or gas, also minerals and stone of whatever kind in and under

above described lands, with the right to go on the premises and explore and mine for same not nearer than 300 feet from any building, and this option will be effective as long as A. B. Saling continues to pay William Scott the sum of $50.00 per month in advance, and not longer; provided, however, this option shall terminate and all sums paid hereunder be forfeited absolutely unless the same is exercised before five years from this date. No part of the $50.00 monthly payments shall be applied on the purchase price of the land.

"It is also agreed that any improvements put upon the land at any time since December 1st, 1908, or at any time hereafter, including care of fruit trees, are to be added to the purchase price and that time is of the essence of this agreement, terms as follows: $10,000 cash and balance in three equal annual payments at six per cent interest per annum, upon the payment of said sum of $50.00 per month in advance, to be paid at said times, and in the manner above set forth, and if not paid as herein set forth, then this option shall be void."

Saling sold his interest in the option on September 16, 1909, and was succeeded by the plaintiffs L. P. Hubbard, Mabel Zimmer, and Mendon Schutt. The plaintiffs made the monthly $50 payments by depositing the money in a bank for Scott until October 18, 1910, when Scott notified the bank not to accept any further payments for the reason that he claimed that the moneys should be paid to him in person at his residence. On the last day of October, 1910, the plaintiffs paid $50 to Scott for the ensuing month of November and, on the last day of November, they made the payment for the month of December. On the last day of December, 1910, Scott refused to accept any money for the ensuing month and the plaintiffs then deposited the money in the bank for Scott. Not being able to find Scott on the last day of January or on the last day of February, 1911, the plain-

tiffs deposited the installments in the bank for the use of Scott. These three payments were withdrawn from the bank by Scott in March, 1911. The defendant accepted payments for the months of April and May, 1911, but when he refused to receive payments for the months of June, July and August, 1911, the plaintiffs left the moneys in the bank for him. On August 2, 1911, Scott began a suit against Hubbard, Zimmer and Schutt, plaintiffs here, to cancel the option. In September, 1912, the Circuit Court rendered a decree against Scott and on December 23, 1912, he appealed to the Supreme Court where the decree was affirmed on December 19, 1913. When these plaintiffs filed their answer to the suit prosecuted by Scott, they withdrew from the bank the moneys that they had left there for the June, July and August, 1911, payments, and deposited the same moneys with the clerk of the Circuit Court for the use of Scott. All subsequent installments to and including August 31, 1912, were paid to the clerk of the Circuit Court, but the payments after that date up to and including November 30, 1913, were tendered to Scott and upon his refusal to accept the moneys they were paid to the bank for his use. The moneys left with the bank, aggregating $750, were subsequently paid to Scott and he also received the moneys paid to the clerk of the Circuit Court amounting to $800.

When Saling signed the option he was without money and was unable to purchase the land on his own account, but he entered into the contract with the intention of engaging

"in the business of attempting to secure a customer or customers for said land at such price or prices as he should be able over and above said option price, and that at any time during the life of said option contract any such sum above said option price that he should be

able to secure for said land should constitute his profit and earnings in said business."

The complaint avers that the plaintiffs did not have sufficient means to purchase the land but that they acquired Saling's rights with the intention

"of handling and selling said premises and of realizing as their profit and earnings in such business such price as they might secure from a purchaser over and above the contract price named in said option agreement. All of which was at all times well known to the defendant."

The plaintiffs claim that they were unable to sell the land on account of various acts which were deliberately and designedly committed by Scott. For the purpose of ascribing a motive for Scott's conduct, the complaint charges that at the time the option was signed the land was really worth less than the price agreed upon, but by reason of an increase in the market price of real estate in that vicinity the Scott land increased in value and from June 1, 1910, to May 1, 1913, its reasonable value, subject to the reservations in the option, exceeded the contract price by more than $10,000. The acts of which the plaintiffs complain may be placed in four different chapters, covering four periods of time ending December 31, 1910, in March, 1911, May 31, 1911, and December 31, 1913.

It will be recalled that until October, 1910, all the monthly payments were made at the bank, but that Scott then demanded that payments should be made to him personally at his residence. The plaintiffs alleged that in addition to requiring that the advance payments be made to him in person, the defendant insisted that such payments be made on the last day of the month, and that this requirement was made for the

purpose of causing plaintiffs so much inconvenience that they might possibly fail to make some monthly payment and by such failure terminate the lease. The plaintiffs say that, in order to avoid loss and injury, they yielded to the demands made by Scott and after October, 1910, they tendered or made all the payments to him personally, except on certain occasions when they were unable to find Scott because, as they say, he had absented himself from his residence in furtherance of his plan to hinder the plaintiffs. On December 31, 1910, Scott refused to accept $50 tendered to him for the month of January, 1911, claiming that under the terms of the option the initial payment of $10,000 was due on the purchase price.

The plaintiffs construed the option differently and contended that the first payment on the purchase price could be paid at any time within five years from the date of the option; and, in order to prevent the option from lapsing, the plaintiffs left the monthly installments at a bank until March, 1911, when Scott accepted the moneys left at the bank. The plaintiffs claim that this acceptance operated as an acknowledgment by Scott that his construction of the option was wrong, while he explains the acceptance by saying that the plaintiffs had experienced difficulty in selling the land on account of the mineral reservation in the option, and, for the purpose of removing that difficulty, they orally agreed in March, 1911, to add $10 per acre to the price of the land, and upon reaching such an agreement he accepted the moneys left at the bank for the January, February and March, 1911, installments.

The payments for the months of April and May were made to Scott but the payment for June, which

was due in May, was not made in May. The plaintiffs explain their failure to pay in May by saying that on May 25, 1911, Scott orally proposed to amend the written option so as to make it read thus:

"That the plaintiffs should advance to the defendant $600 on account of the sums which would become due upon the monthly payments under said contract unless the plaintiffs should sooner exercise said option to purchase, and that in that event any part of said $600.00 should apply on the purchase price of said premises."

The plaintiffs aver that they accepted the offer to amend the option; and, having been led to believe that it would be satisfactory to Scott if the money was paid within a week or ten days, they did not tender the $600 until June 1, 1911. The defendant refused to accept the $600, when tendered on June 1, and then on the same day the plaintiffs tendered $50 as the monthly payment for June, but Scott claimed that the option had lapsed because the payment for June had not been made in May and he refused to accept the proffer.

The suit which Scott began in August 1911, was predicated on the theory that the option had lapsed on account of the failure to pay the June installment before the last day of May, but the Circuit Court found that the payment was not made for the reasons assigned by Hubbard, Zimmer and Schutt and held that Scott was not entitled to have the option canceled; and an appeal confirmed the view taken by the Circuit Court: *Scott* v. *Hubbard,* 67 Or. 498, (136 Pac. 653). The moneys which until August 31, 1912, were paid to the clerk of the Circuit Court and the installments paid to the bank subsequent to that date were accepted by Scott after the decision of the suit on the appeal.

The complaint charges that after December 31, 1910, when Scott claimed that the option had lapsed, he

"wrongfully stated to divers and sundry persons that said contract had expired and was void and that the plaintiffs had no rights thereunder and had no right to engage in the business of selling and disposing of said land whereby these plaintiffs were unable to successfully prosecute said business."

Certain real estate brokers had been employed by the plaintiffs to find purchasers for the property and the complaint alleges that in June, 1911, when Scott claimed that the option had terminated on account of the failure of plaintiffs to make a payment in May, the defendant, with intent to injure the plaintiffs in their business, wrongfully stated to different persons that the option had been forfeited and that he had wrongfully and

"with intent and design of injuring the plaintiffs in their said business of selling said lands, stated to each and every of said persons (brokers) that said contract was forfeited and void; that plaintiffs had no rights thereunder to engage in said business of selling said lands and each and every of said agents was thereby caused to and did cease and desist from all their efforts to thereafter find a purchaser or purchasers for said land."

Further complaining, the plaintiffs aver that the suit commenced by Scott in August, 1911, was prosecuted by him wrongfully, maliciously and without probable cause for the purpose of

"rendering doubtful and questionable the title and rights of the plaintiffs under said contract and for the purpose of injuring them in their business of selling said lands"; and that great publicity was given to the suit and "by reason thereof the plaintiffs' rights under said contract were rendered so doubtful that each and every of said real estate agents and brokers ceased and

desisted from all efforts to find a purchaser or purchasers for said lands, and no prospective purchaser could be induced to negotiate with the plaintiffs for the purchase thereof, and plaintiffs' said business was thereby injured and destroyed."

The defendant is also accused of having stated to different persons, even after the rendition of the decree, which the Circuit Court rendered in September, 1912, that the option was void. The plaintiffs aver that they endeavored at all times to carry on their business, but that they were hindered and were unable to sell the land on account of the acts of defendant, to their damage in the sum of $10,000; and they therefore demanded a judgment for $10,000 plus $750 expenses for attorneys employed in the defense of the suit prosecuted by Scott.

The trial court directed a verdict for the defendant on the theory that it was incumbent upon the plaintiffs to allege and prove that they found a specified person who would have purchased had it not been for the words and acts of defendant.

The plaintiffs appealed. AFFIRMED.

For appellants there was a brief over the names of *Mr. Porter J. Neff* and *Mr. Alfred E. Reames,* with an oral argument by *Mr. Neff.*

For respondent there was a brief over the names of *Mr. J. O. Stearns, Jr., Mr. B. F. Mulkey* and *Mr. George W. Cherry,* with an oral argument by *Mr. Stearns.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The complaint alleges in general terms that the statements and conduct of Scott prevented the plain-

tiffs from selling the land; but there is neither allegation nor evidence to show that the language or acts of Scott deterred any specified person or persons from buying. The plaintiffs do not allege that they were negotiating with any named person who would have purchased had it not been for the statements and conduct of Scott. The plaintiffs contend that they are not obliged to allege or prove special damages, while the defendant argues that the action cannot be sustained unless the plaintiffs allege and prove that they suffered a pecuniary loss on account of having been prevented from effecting a sale to some designated person. The difference between the contentions made by the litigants results from the variant positions taken by them concerning the nature of this action. The plaintiffs say that they are suing for damages on account of words slandering their business, while the defendant insists that this is an action for damages predicated upon an alleged slander of title.

1–3. Language which does no more than to disparage the property of another or the quality of the articles which he manufactures or sells is not actionable unless special damages are alleged and proved; but if the language disparaging the property of another also involves an imputation upon him in respect to his trade, business or profession, then the language becomes actionable *per se* and it is unnecessary to allege or prove special damages: *Victor Safe etc. Co.* v. *Deright,* 147 Fed. 211 (8 Ann. Cas. 809, 77 C. C. A. 437); *Waters Pierce Oil Co.* v. *Bridwell,* 103 Ark. 345 (147 S. W. 64, Ann. Cas. 1914B, 837); *Marino* v. *Di Marco,* 41 App. D. C. 76 (Ann. Cas. 1914D, 1149, 48 L. R. A. (N. S.) 1214); *Sternberg Mfg. Co.* v. *Miller etc. Mfg. Co.,* 170 Fed. 298 (18 Ann. Cas. 69, 95 C. C. A. 494); *Quigley* v. *McKee,* 12 Or. 22, 24 (5 Pac. 347, 53 Am. Rep.

320); *Davis* v. *Sladden,* 17 Or. 259, 261 (21 Pac. 140); 25 Cyc. 326. Words to be actionable on the ground that they slander the business of a person must touch the person in his business; and as stated in Odgers on Libel and Slander (5 ed.), 52.

"They must be shown to have been spoken of the plaintiff in relation thereto, and to be such as would prejudice him therein. They must impeach either his skill or knowledge, or attack his conduct therein."

Newell on Slander and Libel (2 ed.), 174. Quoting from 25 Cyc. 327,

"words not actionable within themselves are not actionable when spoken of one in a profession or trade unless they touch him in his profession or business; that is, they must have such a close reference to such profession or trade that it can be said that they are defamatory by means of an imputation upon one in that character, as for example, an imputation upon him as a clergyman, a physician, or a tradesman, distinctly from and independently of being an imputation upon him as an individual. To be actionable it is not sufficient that the words merely be injurious to one whatever his pursuit, but they must prejudice him in the special profession or business in which he is actually engaged."

The defendant is charged with having stated to different persons that the option had terminated and that plaintiffs' rights had ended. Even though it is assumed that the attempt to sell the land was a business within the meaning of the rule invoked by plaintiffs, nevertheless the words charged against Scott do not involve an imputation which touches the plaintiffs in that business. There is no imputation that the plaintiffs were dishonest or deceitful or that they lacked capacity or skill or that they were violating any law in the pursuit of the alleged business. It may be

difficult sometimes to determine whether words spoken of a business, trade or profession involve an imputation touching the person in respect to his business, trade or profession; but, in the instant case, it is clear that the language ascribed to Scott does not involve any imputation touching the plaintiffs in their venture of attempting to sell the land for more than the option price. The instant case is in nowise analogous to any precedent cited by the plaintiffs where it has been held that the language complained of involved an imputation upon the persons and therefore amounted to a slander of the business; but, on the contrary, every adjudicated case upon facts like those presented here proceeds upon the theory that the title to the property, and not the business nor even the property itself, is slandered.

It is very doubtful whether the plaintiffs were engaged in a business within the meaning of the rule of damages concerning the slander of business. The option gave the plaintiffs the right to do a single act and when that act was done, nothing more remained to be done. The plaintiffs were engaged in a venture which, if accomplished, involved a single, isolated act, rather than a business which involved a series of similar transactions extending throughout a continuous period of time.

4–6. While the plaintiffs did not own the land they nevertheless had such an interest in it as would entitle them to damages from any person who slandered their title: Newell on Slander and Libel (2 ed.), 206. If Scott falsely and maliciously made the statements charged against him, he was guilty of slandering plaintiffs' title. The accepted rule is that a plaintiff in an action for damages for slander of title must allege and prove special damages, and it will not be enough merely to

allege in general terms that the complaining party intended to sell to any person who might buy; but he must allege and prove the loss of a sale to some particular person, for the loss of a sale to some particular person is the special damage, and is of the gist of the action: *McGuinness* v. *Hargiss,* 56 Wash. 162 (105 Pac. 233, 21 Ann. Cas. 220); *Burkett* v. *Griffith,* 90 Cal. 532 (27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707); *Wilson* v. *Dubois,* 35 Minn. 471 (29 N. W. 68, 59 Am. Rep. 335); *Lienan* v. *Lincoln,* 1 Duer (N. Y.), 670; *Harriss* v. *Sneeden,* 101 N. C. 273 (7 S. E. 801); *Hopkins* v. *Drowne,* 21 R. I. 20 (41 Atl. 567); 25 Am. & Eng. Enc. of Law (2 ed.), 1079; 25 Cyc. 248; Odgers on Libel and Slander (5 ed.), 80.

7. In addition to the damages claimed on account of the loss of a sale of the land, plaintiffs allege that they incurred an expense of $750 for attorneys in the defense of the suit prosecuted by Scott, and they contend that they are entitled to be reimbursed in this action. The decree in the suit was for Hubbard, Zimmer and Schutt and the decree rendered there is supposed to have reimbursed them for any expenses incurred in the defense of the suit. It is true that the fees fixed by statute, and technically known as costs, did not furnish full compensation for the services of attorneys, and, for that reason, at least one court has permitted a complainant in an action for slander of title to recover a reasonable sum previously expended for the services of an attorney in a suit to quiet title: *Chesebro* v. *Powers,* 78 Mich. 472 (44 N. W. 290); but the weight of authority is to the contrary: *Cohen* v. *Minzesheimer,* 118 N. Y. Supp. 385; *Cormier* v. *Bourque,* 32 N. Bruns. 283; *Ashford* v. *Choate,* 20 U. C. C. P. 471; see also: *Brentman* v. *Note,* 24 N. Y. St. Rep. 281, 3 N. Y. Supp. 421; *McGuinness* v. *Hargiss,* 56 Wash.

162 (105 Pac. 233, 21 Ann. Cas. 220). The decree awarded to the defendants in the suit, the plaintiffs here, is supposed to have adjudged to the prevailing parties all sums to which they were entitled on account of expenses incurred there. The defendants in the suit could not have recovered $750 as a part of their disbursements there: *McGuinness* v. *Hargiss,* 56 Wash. 162 (105 Pac. 233, 21 Ann. Cas. 220); nor can they recover here for a disbursement made there: *Yuen Suey* v. *Fleshman,* 65 Or. 606, 614 (133 Pac. 803, Ann. Cas. 1915A, 1072). The judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT concur.

Argued June 26, reversed and remanded July 3, 1917.

STEWART *v.* KING.

(166 Pac. 55.)

Corporations — Subscription Agreement — Construction — "Denouncement."

1. An instrument, reciting that two persons have "denounced" ten mineral claims in the state of Panama, and stating that the owners of the oil field offer a one-third interest payable on receipt of a telegram from one of them that an opportunity is open to subscribe for stock in the proposed company, and providing for a preliminary payment to be telegraphed to the order of such owner, the balance to be due and payable as soon as the first lease shall be drawn which would bind the lessee to drill and develop the land, and that as soon thereafter as the survey was completed and titles obtained, there should be organized an ownership company to own and control the company, and stock issued to different subscribers in proportion to the amounts subscribed and paid in, and providing that the signer subscribes the amount set opposite his name to the Panama oil fund, amounted to a preliminary subscription to the stock of a corporation to be organized as a holding company for the purpose of exploiting the oil property; a "denouncement" being a claim to work an alleged abandoned mine, reported to the authorities or the report of the discovery and pre-emption of and claim to a new mine.

Corporations—Right of Stockholders—Action Against Promoters.

2. Where a person made a preliminary subscription to stock of a corporation to be organized and the money was applied to fully paying up the shares of stock which were issued, the money so paid became funds of the corporation in the hands of the promoters; and, in the absence of any showing that the corporation has been remiss in its duty, or its controlling officers have refused to act, such person has no cause of action against one of the promoters directly for a recovery of his money paid on the ground that such promoter has never caused land to be conveyed to the corporation as contemplated.

[As to promoters and their relations with corporations, see notes in 17 **Am. St. Rep.** 161; 85 **Am. St. Rep.** 385.]

Corporations — Stockholders — Action Against Promoter — Necessary Parties.

3. In an action by one who subscribed for stock before the formation of a corporation, against one of the promoters who received the money, another promoter, who did not receive any of the money sought to be recovered, was not a necessary party defendant merely because he has an interest in the embryo title to the land.

Trusts—Trust Agreement Concerning Land—Statute of Frauds.

4. In view of Section 804, L. O. L., providing that no estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property can be created, transferred or declared otherwise than by operation of law or by a conveyance or other instrument in writing, etc., in an action by a subscriber to corporate stock against a promoter to recover amount paid, the defendant could not rely upon a trust agreement regarding the property executed by other stockholders which the plaintiff did not sign.

Corporations—Stockholders—Action Against Promoters—Defense.

5. In an action by a subscriber to stock against one of the promoters of the corporation to recover the money paid, on the ground that defendant had not secured title to oil lands and conveyed the same to the corporation as agreed, the fact that defendant and the other promoter had been diligent in their efforts to acquire title was not a defense, in the absence of a showing when they should have acquired title.

From Jackson: FRANK M. CALKINS, Judge.

Action by W. H. Stewart against George F. King. From a decision sustaining plaintiff's demurrer to the pleas of abatement claimed by defendant and the resulting judgment as prayed for by reason of defendant refusing to further plead, the defendant appealed. Reversed and remanded.

Department 1. Statement by MR. JUSTICE BURNETT.

This action is founded upon a writing attached to the amended complaint as "Exhibit A," which in the preamble recites in substance that George F. King and Rox Underwood have denounced ten mineral claims near Garachine in the State of Panama, and gives a general description with reference to its situation in respect to navigation and as to its containing many oil springs. Then follows this language:

"The owners of this oil field offer a one-third interest in the same which be free and clear of any incumbrance for the sum of $20,000.00 payable as follows: Upon receipt of a telegram from Geo. F. King stating that the opportunity is open to subscribe for stock in the proposed Panama Oil Company, then five per cent of the full amount of $20,000.00 or $1,000.00 is to be telegraphed to the order of Geo. F. King, and the balance will be due and payable as soon as the first lease is drawn and signed which will bind the lessee to drill and develop the land which is leased to the lessee, (the terms of said lease cannot be determined at the present time). As soon thereafter as the survey is completed and the titles obtained, there shall be organized an ownership company to own and control the property, and stock issued to the different subscribers in proportion to the amounts subscribed and paid in. The amount of taxes upon mineral claims in Panama is $100.00 gold per claim per annum.

"I hereby subscribe the amount set opposite my name to the Panama Oil Fund."

The complaint itself avers that the defendant represented to the plaintiff and the assignor of the latter that he had made the denouncements mentioned; that he would secure title to the lands within ninety days from that time and that he solicited from the plaintiff the payment of $1,000 which would make him a proportionate owner in the mineral rights to the lands.

He further charges that acting upon said representations he signed "Exhibit A" subscribing $1,000 in a corporation to be organized, and paid to the defendant that amount of money. The complaint declares that "the said corporation was organized and shares of stock were issued by said corporation to the said several parties in proportion to the several payments made by the said named parties respectively to said defendant."

Contending that the defendant has never secured title to the lands, nor caused the same to be conveyed to the corporation, nor repaid the money to plaintiff, although duly demanded, the plaintiff asks judgment for $1,000 and interest thereon from the date of its payment to the defendant. In almost identical terms the plaintiff sets out a like transaction between the defendant and the plaintiff's assignor.

Without denying any of the allegations of the complaint, the defendant sets up what he styles four pleas in abatement. The first is to the effect that in pursuance of the terms of "Exhibit A" attached to the complaint the corporation was organized by the parties signing the paper, including the plaintiff and his assignor; that they subscribed for stock therein to the extent of the amounts they had paid and the shares were issued to them as fully paid up and nonassessable. The second plea is to the purport that the transactions had in pursuance of "Exhibit A" were not only with the defendant, but with Underwood, who is a necessary party to the suit. The third is in substance that the plaintiff and his associates became dissatisfied with the delay in acquiring title to the lands owing to dilatory tactics employed by the authorities in Panama; that the defendant called together all the

signers of "Exhibit A," including the plaintiff and his assignor, and arranged with them that the defendant should convey to a trustee, to be named by them, certain lands of the defendant of the value of $30,000 in trust for their benefit, to be sold by the trustee and the proceeds applied to the repayment of the sums of money subscribed when it should be ascertained that title to the Panama realty could not be acquired, in pursuance of which the defendant executed the deed, placed it in the hands of the trustee, appointed by the subscribers, who accepted the same and placed it upon record; but that having accomplished this the plaintiff and his assignor refused to execute the correlative agreement; that the parties who did execute this contract are unwilling to release the land and desire to retain it for security for the purposes mentioned in the trust deed, in consequence of which the plaintiff is estopped to maintain this suit. The last plea is to the effect that after the signing of "Exhibit A" the defendant and Underwood, mentioned therein, proceeded with diligence to acquire title from the State of Panama to the lands in question; that owing to the delay in legislation in that State and litigation in which the defendant and Underwood have prevailed thus far, the title has not been acquired, although they have made earnest efforts to that end; and that on account of this the instant action is premature.

The plaintiff's demurrer to these several pleas being sustained and the defendant having refused to plead further, the Circuit Court rendered judgment conformably to the prayer of the complaint and the defendant appeals. REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Alfred E. Reames.*

For respondent there was a brief and an oral argument by *Mr. Gus Newbury.*

MR. JUSTICE BURNETT delivered the opinion of the court.

According to recitals of "Exhibit A" the defendant and Underwood had what is known in Spanish and Mexican mining law as "denouncements" of certain mineral lands. In the sense in which it is used in the instant case the term is defined by the Standard Dictionary as

"(1) To report a mine to the authorities as unoccupied or abandoned; hence, to claim the right to work a mine. (2) To report the discovery of and preempt; claim, as a new mine."

1. It thus appears that the defendant and Underwood claimed some initial rights in the property in question. Taken by its four corners "Exhibit A" amounts to a preliminary subscription to the stock of a corporation to be organized as a holding company for the purpose of exploiting the property. The so-called plea in abatement shows that the money was not only paid, but that by agreement of those paying it they formed the corporation and applied the money subscribed to fully paying up their shares of stock which were issued to them, and they still own and hold them.

2. Under these circumstances the money paid for the shares became funds of the corporation in the hands of the defendant as one of its promoters. As stated in *Wills* v. *Nehalem Coal Co.*, 52 Or. 70, 77 (96 Pac. 528), in treating of the relationship between the promoter and a corporation:

"Whenever the breach of trust consists in a wrongful dealing of any kind, or manner, with corporate property or with corporate franchise, the corporation

itself is primarily interested and must institute and maintain any equitable suit to redress the wrong, while, on the other hand, whenever the acts of the directors are of such a nature that they directly and primarily affect the interests of stockholders in their shares of stock, by diminishing its value, or otherwise impairing their proprietary rights in it, then the stockholders are directly injured and are primarily interested. Money or property received by a corporation in payment of stock subscribed and money due for stock subscribed is the property of the corporation, and constitutes its assets, and therefore any act of the directors unlawfully disposing of or dealing with such property is primarily an injury to the rights of the corporation."

The doctrine of that case is to the effect that in the first instance the corporation itself must sue to recover its money in whatever adverse custody it may be, and that in the absence of an actual or virtual refusal of the officers of the concern to act no such litigation will lie at the behest of the stockholder. There is no showing here that the corporation itself cannot or will not act, or that its officers prevented or refused action to recover the money subscribed for its stock. According to the first plea in abatement the plaintiff put his money into the scheme pursuant to his subscription and the organization of the concern. Under the circumstances disclosed by the first plea the plaintiff must work out his remedy through the agency of his own creature, the corporation. He got what he subscribed for, the paid-up shares in the business. It is for the organization thus created to effect the collection of its funds and the acquisition of title to the property. In the absence of any showing that it has been remiss in its duty, or that its controlling officers refuse to act, there is no cause of suit or action by the plaintiff against the defendant directly.

3. As to the second plea in abatement claiming that Underwood is a necessary party defendant, it is sufficient to say that it does not appear that he received any of the money which the plaintiff seeks to recover; and the mere fact that he has an interest in the embryo title to the lands does not affect the cause of action for the money said to be in the hands of the present defendant.

As to the third plea, it is disclosed that the plaintiff and his assignor refused to execute the trust agreement or to accept the provisions of the deed of trust. This is tantamount to a statement that there is no agreement in writing covering the subject. The matter is governed by Section 804, L. O. L., reading thus:

"No estate or interest in real property, other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing, subscribed by the party creating, transferring, or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law."

4. The plea is a virtual confession that the defendant has alleged something at law which he cannot prove under the statute, on account of which the demurrer to that plea should be sustained.

5. Last of all the plea to the effect that the defendant and Underwood have been diligent in their endeavors to acquire title, but have not yet been able to effect their purpose, is not controlling in the premises. There is nothing stated in that plea about any time within which they should acquire title, and mere diligence will not affect the case. The demurrer was properly sustained to all the pleas except the first. That one constitutes a good defense to the action and is not

amenable to the plaintiff's attack upon it. The judgment will therefore be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued June 26, reversed and remanded July 3, 1917.

YOUNG *v.* KING.*

(166 Pac. 53.)

Compromise and Settlement—Nature and Requisites.

1. A settlement and compromise of a claim asserted on reasonable grounds and in good faith, which the parties, having equal knowledge of the facts, consider doubtful, constitute a new and valid agreement, which will be enforced in law, although the matter compromised be not in fact doubtful in legal contemplation, and the settlement be not what a court would have adjudged upon the facts of the case.

Compromise and Settlement—Enforcement—Defenses.

2. In an action to recover $1,000 as damages for breach of agreement of defendant to give a note for that amount in settlement of a dispute between parties, a plea that defendant deposited note with another party for benefit of plaintiff according to contract, but that plaintiff refused to accept it, set up a good defense.

Compromise and Settlement—Enforcement—Defenses.

3. In an action to recover $1,000 as damages for breach of agreement of defendant to give a note for that amount in settlement of a dispute between parties, plea alleging that said dispute arose out of a prior contract, from the performance of which the defendant was for various reasons excused, did not set up a defense, since defendant confesses to the new stipulation, the legal effect of which is to supersede all former contracts and contentions.

Compromise and Settlement—Enforcement—Defenses.

4. In an action to recover $1,000 for breach of agreement to give a note for that amount in settlement of a dispute between the parties, plea alleging that said dispute arose out of a prior contract under which plaintiff paid money to defendant, and another, who was there-

*For authorities discussing the question as to whether a claim must be doubtful to sustain a compromise, see note in 15 L. R. A. 438.
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fore a necessary party to the suit sets up no defense, since defendant confesses to the new stipulation, the legal effect of which is to supersede all former contracts and contentions.

[As to when a compromise and settlement is enforceable on payment of part of a demand, see note in 100 **Am. St. Rep.** 412, 429.]

From Jackson: FRANK M. CALKINS, Judge.

Action by Charles F. Young against George F. King. Plaintiff filed demurrers to defendant's pleas in abatement and same being sustained the defendant refused to amend, resulting in a judgment as prayed for in the complaint and defendant appealed. Reversed and remanded.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff claims that he and his assignor mentioned in the second cause of action were each induced by the defendant to pay him $1,000 as an investment in oil lands in Panama; that he failed to secure title to the property and afterwards they settled the dispute between them by the defendant agreeing to give and the plaintiff contracting to accept the former's note for $1,000, payable at a future date, but that he failed to give the note, wherefore judgment is demanded for that amount. The second cause of action is like the first except that a similar transaction was had between the defendant and the plaintiff's assignor.

The defendant filed three separate defenses styled pleas in abatement. After a long recital of matter of inducement the substance of the first is that the only money disbursed by plaintiff was paid to the defendant and one Underwood from which the pleader deduces the conclusion that Underwood is a necessary party defendant. By the second it is charged in effect that one of the conditions of the contract under which the plaintiff subscribed the money was that he and his asso-

ciates should join the defendant and Underwood in a sale of one-third of the property for $20,000, so that Underwood and King should have one-third for their services in securing the title to the property, the plaintiff and his associates should own one-third for which they had paid $5,000, and those whom they should induce to invest $20,000, should be vested with title to the remaining one-third at that price; that the plaintiff and those concerned with him had failed to sell one-third at $20,000, in consequence of which the defendant proposed to assist them in effecting such transfer and to that end they all endeavored to obtain subscriptions for that sum, but were unable to obtain more than $6,500, by reason of all of which the plaintiff and his associates had failed to comply with the contract; and further, that by the terms of their subscription agreement the prospective corporation was not to be formed until the titles were secured; and that owing to litigation in the State of Panama about the realty the title had not yet been determined so that for those reasons the stock could not be distributed. The last plea is to the purport that as a settlement of the dispute between plaintiff and defendant the former agreed to take and the latter to give his note for $1,000 and to deposit the same with parties named, for the benefit of the plaintiff; that the defendant executed the note as agreed and lodged it with the depositary as stipulated, but that the plaintiff refused to accept it. The court sustained general demurrers to these pleas which were alike as to both causes of action and as the defendant stood upon his answers thus overturned, judgment was rendered against him according to the prayer of the complaint. He appeals.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Alfred E. Reames.*

For respondent there was a brief and an oral argument by *Mr. Gus Newbury.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The essence of the plaintiff's lengthy declaration appearing in the record is that the parties settled and compromised their differences by the defendant promising to give and the plaintiff agreeing to accept the note of the former, which stipulation the defendant failed to perform on his part. The rule is well established since *Smith* v. *Farra,* 21 Or. 395 (28 Pac. 241, 20 L. R. A. 115), that

"a settlement and compromise of a claim asserted on reasonable grounds and in good faith, which the parties, having equal knowledge of the facts, consider doubtful, constitute a new and valid agreement which will be enforced in law, although the matter compromised be not in fact doubtful in legal contemplation, and the settlement be not what a court would have adjudged upon the facts of the case": See also *Butson* v. *Misz,* 81 Or. 607 (160 Pac. 530).

2. According to the allegations of the complaint when reduced to its lowest terms this new agreement superseded all previous conventions and settled all former disputes. This is admitted by the third defense which also pleads performance of the new stipulation on the part of the defendant, together with the refusal of the plaintiff to accept the note. This constitutes a defense to the action and the court was in error when it sustained the demurrer as to that plea.

3, 4. The other so-called pleas in abatement refer to the matters of inducement stated by the plaintiff lead-

ing up to the agreement to take the note mentioned. They are not apropos of the dispute because the defendant confesses to the new stipulation the legal effect of which is to supersede all former contracts and contentions. Whether the matter be called pleas in abatement or in bar is of no moment. The court committed an error in sustaining the demurrer to the third plea. For this reason the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Motion to dismiss appeal denied June 27, 1916.
Argued June 20, affirmed July 3, 1917.

RANZAU *v.* DAVIS.

(158 Pac. 279; 165 Pac. 1180.)

ON MOTION TO DISMISS.

Appeal and Error—Sufficiency of Sureties.

1. On motion to dismiss, in the absence of legislative authority, the Supreme Court will not consider the sufficiency of the sureties upon the undertaking on appeal.

Appeal and Error—Substantial Controversy.

2. Suit to enjoin levy and sale of land on the ground that plaintiff is the true owner raises a substantial controversy whether plaintiff is the owner of the property, and whether, if it is found to be his, it can be subjected to payment of the debt of another, though the land has already been sold on execution and such sale confirmed.

ON THE MERITS.

Trusts—Construction—Interest of Trustee.

3. Evidence *held* to show that in conveying property to a daughter-in-law in trust for grandchild it was the intention of the settlor that trustee and her husband should have a beneficial interest in the property during their son's minority.

Trusts—Trustee's Right to Disbursements—General Rule.

4. It is a general rule that disbursements which will be allowed a trustee will depend much upon the character of the trust and the directions given by the instrument of trust.

Trusts—Trustee's Right to Disbursements—Upkeep of Premises.

5. If a trustee has the power of managing the estate, he will be entitled to all the expenses of keeping it up, such as hire of servants, salaries, taxes, costs of repairs, rebuilding farm houses, manuring, draining, fencing and other like expenses.

Trusts—Expenditures for Which Estate is Liable.

6. To create a liability against a trust estate in favor of a third person, there must be more than the mere personal engagement of the trustee, for the expenses of properly administering a trust, although a lien on behalf of the trustee on the estate in his hands, are, not so as to a person employed by him, and in such cases the only remedy is against the trustee personally unless he is insolvent.

Trusts—Construction—Interest of Trustee—Deed to Mother for Son's Benefit.

7. A deed to a mother as trustee, if executed for the benefit of the son when he shall reach majority, clothes her with an executory trust, which does not become executed until the son reaches majority.

Trusts—Executory—Vested Title in Beneficiary.

8. So long as a trust is executory the legal title cannot vest in the beneficiary.

Trusts—Management of Property—Operation of Farm.

9. Where funds which were given to a daughter-in-law in trust for her son with the intention that she and her husband should have the benefit thereof until the son's majority were invested in a farm, the trustee and her husband had authority to operate the farm so as to yield an income for the purposes of the trust.

[As to control by courts of equity of discretion of trustee, see note in 6 **Am. St. Rep.** 885.]

Trusts—Necessary Expenditures—Liability of Estate.

10. A trust estate was liable for services necessary for cultivating the property and caring for crops raised thereon which was in the interests of the beneficiary and for the benefit of the estate, since the trustee now insolvent had she paid such expenses would have had a just claim against the estate therefor.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BENSON.

Upon motion to dismiss appeal. The defendant Davis obtained a judgment in an action for the recovery of money against John P. Ranzau and Dorothea

V. Ranzau, his wife, and thereafter had an execution issue thereon with directions to the sheriff to levy upon and sell certain real property, in satisfaction of such judgment. The plaintiff herein who is the minor son of the defendants in the action at law, then commenced this suit to enjoin the levy and sale of the real property upon the ground that he is the owner thereof. A trial was had in the lower court and from a decree dismissing the suit and ordering a sale of the property upon execution the plaintiff has appealed to this court and defendants move to dismiss the appeal.

MOTION DENIED.

Mr. Charles E. Lenon and *Mr. Charles L. McNary,* for the motion.

Mr. Walter C. Winslow, contra.

MR. JUSTICE BENSON delivered the opinion of the court.

The motion is based upon two contentions: (1) That the sureties upon the undertaking on appeal are insufficient; and (2) that the appellant did not file a *supersedeas* bond and that the sheriff has already sold the land upon execution and such sale has been duly confirmed and that therefore there is no substantial controversy upon which this court is called to pass.

1. Considering these contentions in the order indicated, we may say that there is no record before us upon which to base any conclusions as to the sufficiency of the sureties and, if there were, counsel has failed to call our attention to any statutory provision authorizing us to pass upon such question, nor have we in our investigation been able to discover any. The right of appeal is purely statutory and in the absence of legislative authority we must decline to consider the matter.

2. The second contention is also without merit. The suit raises the issue as to whether, under the facts alleged, the plaintiff is the owner of the property and whether, in the event it is found to be his, it can be subjected to the payment of the debt of another. The fact that it has already been so applied does not dispose of it since if this court should reverse the decree the plaintiff would be entitled to restitution. The case of *Dimick* v. *Latourette,* 72 Or. 231 (143 Pac. 896), which is relied upon by the defendants is not in point, since in that case a reversal of the decree could not have reached the money already paid. The motion is therefore denied. MOTION TO DISMISS DENIED.

MR. JUSTICE EAKIN absent.

Affirmed July 3, 1917.

ON THE MERITS.

(165 Pac. 1180.)

This is a suit by Arthur J. Ranzau, by Dorothea V. Ranzau, his guardian *ad litem,* against J. C. Davis and William Esch, sheriff of Marion County, Oregon, in which the defendants obtained a decree in their favor and the plaintiff appealed. The facts are set forth in the opinion of the court. AFFIRMED.

For appellant there was a brief over the names of *Mr. Charles E. Lennon, Mr. John H. McNary* and *Mr. Charles L. McNary,* with oral arguments by *Mr. Lennon* and *Mr. John H. McNary.*

For respondents there was a brief and an oral argument by *Mr. Walter C. Winslow.*

Department 2. MR. JUSTICE BEAN delivered the opinion of the court.

This suit involves the question as to whether or not the farm described in the complaint is subject to an execution upon a judgment in favor of defendant Davis obtained for services performed, boarding help, and expenses incurred raising and harvesting a crop of hops on the land. The trial court held that the property was liable for the debt and plaintiff appealed.

The plaintiffs assert that the real estate is the property of Arthur J. Ranzau, a minor; that the same is held in trust by Dorothea V. Ranzau, his mother. The circumstances relating thereto are about as follows: The grandfather of the alleged beneficiary, John P. Ranzau, at different dates advanced money to his daughter-in-law. She testifies that in 1897 she and her husband borrowed $1,100 to pay off hop-pickers; that at one time her father-in-law advanced $500 for the purchase of an organ and a team of horses for her husband; that in 1908 he purchased town property in Grants Pass of the value of $3,000, taking a deed in the name of his daughter-in-law, and furnished a home for them; that about 1900 he advanced $1,400 which was used to redeem property belonging to her mother-in-law; that in 1901 he supplied $1,100 for a hop-house and the purchase of 160 acres of adjoining land. According to Mrs. Ranzau's testimony a short time before the death of her father-in-law he told her to destroy the book in which the memorandum of the money loaned and expended had been kept, to put this money aside for his grandchild, and to invest it in real estate when he became twenty-one years of age. She states that in the meantime "I and my husband was to have the benefit" and he said "for me to put in trust for my son." The Ranzaus resided

for a time in Grants Pass. On selling the property there they went to Woodburn where Mrs. Ranzau invested in real estate. Selling out in the latter place they went to Portland where they again invested in property which they sold. After that they purchased the farm in question in Marion County in 1909, paying down about four or five thousand dollars and having between $500 and $1,000 of their funds remaining. The deed was executed to "Dorothea V. Ranzau, trustee, and her successors and assigns." In 1911 they purchased an adjoining farm. The property was all adapted to raising hops and they carried on the business, keeping a bank account in different banks in the name of Dorothea V. Ranzau, Trustee, where deposits were made of considerable sums, at one time depositing $5,000, the proceeds of the sale of hops. Mrs. Ranzau also gave notes to the bank signed as trustee. In 1914 the defendant Davis performed the services and advanced money for the expenses mentioned in the cultivation of the hops and in picking and caring for the same. He was paid for his work mostly in checks by Mrs. Ranzau as trustee, that is up to July. From then until December of that year his labor and the expenditures made by him were not liquidated.

There is considerable controversy in regard to whether the deed was executed to Mrs. Ranzau, as trustee, for the benefit of her son, or for the purpose of avoiding the payment of indebtedness. She claims that she stated to Mr. Davis that the property belonged to her son, and yet in her testimony she refers to the fact of having given a mortgage for $8,000 on her farm, the one in question, to the Portland Trust Company of Oregon. Considering the property as held in trust the directions given by the settlor when

he attempted to make the gift were oral and it is not perfectly clear what his desires were.

3. Taking the most favorable view of the facts as claimed by the plaintiff, we understand that the grandfather was desirous of assisting his son and daughter-in-law. On account of the son's habits he preferred to advance the money and convey the property to his daughter-in-law with the request that when the grandchild arrived at the age of majority it should be invested for him. The purchase of a home in Grants Pass for his son and his wife and also the loan to pay the hop-pickers were concrete examples of the manner in which they should use the property. His acts speak with greater clearness than his words. It seems that Mrs. Ranzau has managed the property and the funds derived therefrom with a view to carrying out his intentions, sometimes making losses and sometimes gains. It therefore appears that the trustee and her husband have a beneficial interest in the property as long as their son is a minor.

4, 5. It is a general rule that the disbursements that would be allowed a trustee would depend very much upon the character of the trust and the directions given by the instrument of trust. If a trustee has the power of managing an estate he will be entitled to all the expenses of keeping it up, such as the hire of servants, salaries, taxes, costs of repairing, rebuilding farm houses, manuring, draining, fencing, and other expenses of that kind: 2 Perry on Trusts, § 913. It is stated in 28 Am. & Eng. Enc. of Law (2 ed.), at page 942:

"The estate is not liable for obligations assumed by the trustee in excess of his authority; but the estate will be liable if the trustees are acting within the limits of their stated powers or with implied authority. Thus, trust property which has been embarked

in business, under a power, is primarily liable to creditors for debts incurred in conducting the same";

citing, among others, *North Am. Coal Co.* v. *Dyett,* 7 Paige (N. Y.), 9; *Mathews* v. *Stephenson,* 6 Pa. St. 496; *Woddrop* v. *Weed,* 154 Pa. St. 307 (26 Atl. 375, 35 Am. St. Rep. 832).

6. A transaction to create a liability against the estate in favor of a third party must be more than the personal engagement of the trustee, for while the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands, this right against the estate, unless in exceptional cases, does not extend to the person employed by him. In general their only remedy or compensation is against the trustee personally unless he is insolvent. In a case in Iowa, however, it was held that where a claim against the estate is adjudicated with all parties interested before the court, and the amount found due is adjudged to be made from the trust property, the trustee cannot complain because the judgment was not rendered against him personally: *Smith* v. *Walker,* 49 Iowa, 289.

7, 8. The deed to the mother, as trustee, if executed for the benefit of the son when he shall reach the age of majority, clothes her with an executory trust which does not become executed while the son is a minor, and so long as a trust is executory the legal title cannot vest in the beneficiary: *Boyd* v. *England,* 56 Ga. 598; *Sanders* v. *Houston etc. Warehouse Co.,* 107 Ga. 49, 53 (32 S. E. 610).

9. It appears that the settlor, John P. Ranzau, Sr., placed the property in the hands of the daughter-in-law with the intention that she and her husband should have the benefit thereof at least until the son was of

age. A portion of the funds derived from the alleged gift were invested in the two farms which were naturally adapted only to agricultural purposes. It was therefore the duty of the trustee, and she necessarily had implied authority in order to carry out the wish of the settlor, to assume the management and control of the property for the benefit of the usees whomsoever they might be. There was as much reason and authority for the trustee with the assistance of her husband to operate the farm herself as to lease it out to others for the purpose of cultivation. We think it was her manifest duty to make such use of the property as would cause it to yield an income for the purpose and benefit of those for whom it was contemplated by the grandfather.

10. The debt, therefore, contracted by her as trustee, which was necessary in the cultivation of the farm and in carrying on the business, is a debt which is created for the benefit of the estate within the contemplation of the law: *Sanders* v. *Houston etc. Warehouse Co.*, 107 *Ga.* 49, 53 (32 S. E. 610); 28 Am. & Eng. Enc. of Law (2 ed.), 942, notes.

The answer expressly alleges and the unquestioned proof shows that the services performed by Davis and the expenditures made by him were necessary and indispensable for the purpose of cultivating and caring for the crop of hops raised on the farm for the enhancement of the interest of the beneficiary. The trust property is subject to the debt so incurred: See authorities cited above. It appears from the evidence that at one time the sum of $5,000 received from the sale of hops was deposited in the bank to the credit of the trustee and that by means of the hop industry she was enabled to liquidate a considerable portion of the deferred payments for the purchase price of the

farms. It is apparent that there can be no profit in a farm without cultivation. Labor, and the food for laborers engaged in training the vines and picking the hops are among the first essentials necessary to the successful operation of a hop farm, for the betterment of the estate, and to prevent it from becoming profitless and deteriorating in value. The debt of the defendant belongs to a different class, and is clearly distinguishable from obligations incurred in the purchase of merchandise for the use of a *cestui que trust* entirely disconnected with the trust estate, and from the personal obligations of the trustee. The trustee and her husband have no other property subject to execution. She is practically insolvent except for any interest which she may have in the premises in question, all of which, together with the interest of her husband, is subject to the execution.

In England the rule is that where the trustee is authorized to carry on a business and to employ certain funds or property for that purpose, a creditor of the business has a right to the benefit of the lien which the trustee has against the property devoted to the purpose, subject to any equities between the trustee and the *cestui que trust,* none of which appear in this class: 2 Lewin on Trusts, p. 862. If Mrs. Ranzau, the trustee, had paid for the balance of the labor and expenditures of defendant Davis in relation to the hops, could there be any question but that she would have a just claim against the estate for the same? We think such a claim would be sanctioned by the courts. When the matter is properly before the court, a creditor who assisted in the business should not be disappointed in payment so far as the funds dedicated are concerned: *Strickland* v. *Symons,* 26 Ch. D. 248; Lewin on Trusts, p. 862, note. The distinction made

in England as to "dedication to particular trade purposes" is not always maintained in the United States, but the rights of the creditor to reach the trust property, directly, are based upon analogous reasons. It is stated in 3 Pom. Eq. Juris. (3 ed.), p. 2104, note, as follows:

"Where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery."

See *Norton* v. *Phelps,* 54 Miss. 467; Ames' Cas. on Trusts, 421.

In *Gisborn* v. *Charter Oak Life Ins. Co.,* 142 U. S. 326, 337 (35 L. Ed. 1029, 12 Sup. Ct. Rep. 277), Mr. Justice BREWER, in delivering the opinion of the court, said that, in mining, it is not a trustee's duty to stop work the moment a vein is lost, and that, though it could not be foretold in advance how great had been the displacement, it was a reasonable exercise of the power vested in the trustee to make some limited exploration to see if the lost vein could not be recovered, and that reasonable expenses thus incurred are chargeable upon the trust estate.

The subjection of the property in question to the satisfaction of the debt of defendant is in effect applying the issues and profits of the farm, namely the proceeds of a former hop crop which were used in paying for the realty, to the liquidation of such indebtedness, and in equity and good conscience this should be done. It is the province of a court of equity

to lend its aid in the fair administration of a trust, but not to exercise its jurisdiction for the purpose of defrauding one for labor and expenses bestowed upon property claimed to be, or held in trust.

For at least two reasons, the interest of the Ranzaus in the property, and the circumstances and conditions of the trust estate, the judgment of the Circuit Court which had the benefit of hearing all the witnesses and so was in a good position to pass upon the merits of the case, should be affirmed, and it is so ordered.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued June 19, affirmed July 3, 1917.

STATE v. MARASTONI.*

(165 Pac. 1177.)

Intoxicating Liquors—Prohibition Statute—Construction—"Manufacture."

1. One who presses juice from grapes, puts it in a vat and permits it to ferment by natural process with intent to use part of it in the state as a beverage for himself and family, manufactures wine in violation of Gen. Laws, 1915, page 150.

[As to burden of proof of right to sell in prosecution for illegal sale of intoxicating liquors, see note in Ann. Cas. 1913C, 626.]

Intoxicating Liquors—Prohibition Statute—"Manufacture."

2. Where "manufacture," as used in Gen. Laws 1915, page 151, Section 5, means to make, irrespective of quantity produced or use to which it is to be put.

Constitutional Law—Intoxicating Liquors—Prohibiting Manufacture—Constitutionality.

3. Article I, Section 36, of the Constitution, as amended (see Laws 1915, page 12), forbidding the manufacture of intoxicating wine for the maker's own use, does not violate the Fourteenth Amendment of the U. S. Constitution.

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*On power to prohibit or restrict one's using intoxicating liquors, or having the same in his possession for his own use, see notes in 24 L. R. A. (N. S.) 173; L. R. A. 1915D, 172. REPORTER.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Joe Marastoni was convicted and fined by the municipal court of the City of Portland for violating the law relating to the manufacture of intoxicating liquors and appealed. Affirmed.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

The defendant was complained against in the municipal court of the City of Portland for a violation of Chapter 141 of the General Laws of 1915, relating to the manufacture of intoxicating liquor. The complaint is as follows:

"The said Joe Marastoni, on the 27th day of September, A. D. 1916, in the county of Multnomah and state of Oregon, then and there being, did then and there unlawfully and wilfully keep and maintain as a common nuisance that certain place known and described as 344 Second Street, in the city of Portland, in the county and state aforesaid, by then and there at said place manufacturing and keeping for sale, barter, and delivery, in violation of law, certain intoxicating liquors, to wit, wine, and by then and there keeping and using in said place certain intoxicating liquors, bottles, kegs, barrels, syphons, and other vessels containing intoxicating liquors, and other property, for the purpose of keeping and maintaining said place above described as a common nuisance, contrary to the statutes in such case made and provided, and against the peace and dignity of the state of Oregon."

That portion of the Constitution bearing upon the matters here discussed is Article I, Section 36, in effect January 1, 1916, and is as follows:

"From and after January 1, 1916, no intoxicating liquors shall be manufactured, or sold, within this state, except for medicinal purposes upon prescrip-

tion of a licensed physician, or for scientific, sacramental or mechanical purposes. * * "

The statute of 1915 so far as it relates to this subject is as follows:

"Section 1. This entire act shall be deemed an exercise of the police powers of the state for the protection of the public health, peace, and morals, and all of its provisions shall be liberally construed for the attainment of that purpose. Section 2. The words 'intoxicating liquor,' as used in this act shall be construed to embrace all spirituous, malt, vinous, fermented, or other intoxicating liquors; and all mixtures or preparations reasonably likely or intended to be used as a beverage, which shall contain in excess of one half of one per centum of alcohol by volume, shall be deemed to be embraced within such term, independently of any other test of their intoxicating character; and all mixtures, compounds or preparations, whether liquid or not, which are intended, when mixed with water or otherwise, to produce, by fermentation or otherwise, an intoxicating liquor, shall also be deemed to be embraced within such term."

That part of Section 6 relating to the manufacture of intoxicating liquor provides:

"The provisions of this act shall not be construed to prevent anyone from manufacturing, for his own use, unfermented wine or non-intoxicating cider, or wine for sacramental purposes, or to prevent the manufacture, from fruit grown exclusively within the state, of vinegar or non-intoxicating cider for use and sale, or to prevent the sale at wholesale only to druggists of ethyl alcohol for medicinal, pharmaceutical, scientific, and mechanical purposes, and for external use and application." Section 15 prescribes: "All premises, buildings, vehicles, boats, and all other places where intoxicating liquors are manufactured, sold, bartered or given away, in violation of law, or where persons are permitted to resort for the drinking of intoxicating liquor as a beverage, or where in-

toxicating liquors are kept for sale, barter, or delivery, in violation of law, and all intoxicating liquors, bottles, glasses, kegs, pumps, bars, and other property kept in and used in maintaining such premises, buildings, vehicles, boats, or other places, are hereby declared to be common nuisances; *provided,* that nothing in this act shall be construed to interfere with the rights of seagoing vessels to keep liquor thereon, provided they comply with all the provisions of this act; and every person who maintains or assists in maintaining such common nuisance shall be held guilty of a misdemeanor, and upon conviction shall be punished for each offense as provided in section 36 hereof for offenses under this act."

The defendant was convicted in the municipal court and appealed to the Circuit Court. The case was there tried before the court without a jury upon a stipulated state of facts, which stipulation we quote:

"That Joe Marastoni, the defendant above named, in the county of Multnomah, and state of Oregon, on or about the 21st day of September, 1916, had in his possession at his private dwelling house located at 344 Second Street, Portland, said county and state, about one third of a ton of grapes, which he then and there crushed, and from which he squeezed the juice into a container, thereby making for his own personal use and for the use of his family, fifty gallons of wine, containing at the said time less than one half of one per centum of alcohol by volume; that thereafter, no act or thing was done by the said defendant, and the said wine was allowed to remain in said container to ferment, and the same did, by the natural process of nature alone, on the 27th day of September, 1916, become fermented wine containing in excess of one half of one per centum of alcohol by volume, and on said date was in the possession of the said defendant in the County of Multnomah and state of Oregon, who was then and there keeping the same for the following purposes: The greater portion thereof was to be used by the defendant and his fam-

ily as a beverage and as a food with their meals as a part thereof, and for culinary purposes, and was not manufactured or kept for the purpose of sale, barter, or delivery. The remaining portion of the same was to be allowed to become vinegar by the further process of nature, and to be used by the defendant and his family for culinary purposes and table use, and not as a beverage."

The court upon these facts adjudged the defendant guilty and imposed a fine of $50, from which judgment he appeals. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Albert B. Ferrera* and *Mr. Joseph H. Page.*

For the State there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, and *Mr. Charles C. Hindman,* Deputy District Attorney, with an oral argument by *Mr. Hindman.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. The principal question is this case is whether the defendant "manufactured" the wine which he kept on the premises. That he pressed the juice from the grapes, put it in a vat, and permitted it to ferment by the usual natural process, with the intent to use part of it in that state as a beverage for himself and family, is admitted. As to this portion of the liquid we are of the opinion that he is guilty of a violaton of the statute. Webster's Dictionary defines the word "manufacture" to mean, "To make (wares, machinery, or other products) by hand, by machinery, or by other agency." In *Murphy* v. *Arnson,* 96 U. S. 131 (24 L. Ed. 773), it is observed:

"Beer may well be said to be manufactured from malt and other ingredients, whiskey from corn, or

cider from apples. The fact that the identity of the original article or articles is lost, and that a new form of a new character is assumed, is not material in determining whether, within the popular idea, as embodied in the customs acts, the article in question is a manufacture from its original elements."

2. We are of the opinion that the word "manufacture" as used in Section 5 of the act referred to means to "make" irrespective of the quantity produced, or the use to which it is to be put. This is made clear by Section 6, which provides that the provisions of the act shall not be construed to prevent anyone from manufacturing for his own use unfermented wine or nonintoxicating cider, wine for sacramental purposes, or to prevent the manufacture of vinegar or nonintoxicating cider for sale. In this case the exception proves the rule as to those things not excepted. Section 5 is general and applies to all intoxicating liquors. Section 6, out of caution, excepts wine manufactured for sacramental purposes and unfermented wine manufactured for the use of the maker, and the framer aware of the fact that cider or grape juice must become intoxicating in the process of becoming vinegar permits these processes to be carried on until the vinous fermentation has passed and the acetous fermentation has begun. The section last referred to makes plain the sense in which the word "manufacture" is employed in the act. It permits the "manufacture" of unfermented wines and wine for sacramental purposes, which indicates clearly that that term is used as a synonym for "make."

It is claimed that because the defendant did no affirmative act to produce fermentation, but simply put the grape juice into a vat and "let nature take its course," he did not manufacture the wine; but this

contention is unsound. Under such a construction no wine ever has been or ever will be made by human agency. The stipulation admits, in substance, that defendant placed the juice in the vat and there allowed it to ferment, and that his intent was to use the greater portion as a beverage for himself and family as food with their meals and to allow the remainder to become vinegar. He but pursued the usual process of making wine. The well-known action of the air and the germs therefrom which produce fermentation were utilized and intended to be ultilized in the process of manufacture. Some of the most important compounds known to commerce and medicine are manufactured by bringing two or more substances in contact and allowing the chemical forces of nature to produce a new compound or substance: *Murphy* v. *Arnson,* 96 U. S. 131 (24 L. Ed. 773).

3. It is also claimed that if Section 36, Article I, of our Constitution should be construed so as to prevent the manufacture of intoxicating wine for the maker's own use, it is violative of the 14th amendment to the national Constitution. This contention is not new and is disposed of in *Mugler* v. *Kansas,* 123 U. S. 653 (31 L. Ed. 205, 8 Sup. Ct. Rep. 273), wherein Mr. Justice HARLAN, speaking of the attitude of the courts toward legislation of this character observes:

"If, therefore, a state deems the absolute prohibition of the manufacture and sale, within her limits, of intoxicating liquors for other than medical, scientific, and manufacturing purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the

preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the constitution to another department. And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare."

No doubt, to many of our citizens accustomed to the use of wine as a table beverage to the same extent that others have used tea or coffee or milk, such extreme legislation may seem drastic and harsh. It certainly seems so to the writer, but whatever may be our individual opinions they must yield to the mandates of the law.

The question is not as to the policy of the law, but as to the power to enact it, and this being found to exist the judgment will be affirmed. AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued June 19, affirmed July 3, 1917.

STATE v. FETSCH.

(165 Pac. 1179.)

Criminal Law—Appeal and Error—Harmless Error.

1. In the absence of objection, failure to make an entry of an order showing that a person accused of assault and battery stated that the name under which he was tried was his own, as required by Section 1466, L. O. L., *held* harmless error.

Criminal Law—Jurisdiction of Court's Sentence.

2. Under Section 1924, L. O. L., as amended by Laws 1911, page 179, providing that, if any person not armed with a dangerous weapon shall assault another or shall commit an assault and battery, he may be fined not less than $50 or more than $500, if tried in the Circuit Court, or not less than $5 or more than $50 if tried before a justice of the peace, a Circuit Court has jurisdiction to impose a fine of $150 in a prosecution commenced in the court of a justice of the peace wherein a fine of only $20 was imposed.

From Multnomah: GEORGE N. DAVIS, Judge.

The defendants, August Fetsch and T. F. Ward, were arrested, tried and convicted in the Justice's Court of Portland of assault and battery and appealed to the Circuit Court, where they were again convicted, and again appeal. The facts and errors complained of are set forth in the opinion of the court. Affirmed.

For appellants there was a brief and an oral argument by *Mr. H. K. Sargent.*

For the State there was a brief over the names of *Mr. Walter H. Evans,* District Attorney, and *Mr. Charles C. Hindman,* Deputy District Attorney, with an oral argument by *Mr. Hindman.*

Department 2. MR. JUSTICE BEAN delivered the opinion of the court.

The defendants, August Fetsch and T. F. Ward, were complained against under fictitious names in the Justice's Court for the district of Portland for the crime of assault and battery and were arrested. They entered pleas of not guilty, and upon being tried were convicted and fined $20 each. An appeal was taken to the Circuit Court where the defendants were found guilty by the verdict of a jury and a fine of $150 each was imposed by the court. An appeal was prosecuted to this court.

1. It is assigned as error that the complaint is insufficient for the reason that the true names of the defendants which appear in the title of the cause are not inserted in the body of the complaint, and that there is nothing in the record to show that an order was made by the court directing that an entry of the fact that the defendants each stated that another name than that in the complaint was his true name, be entered in the journal as provided in Section 1466, L. O. L. Fictitious names of the defendants are in the body of the complaint and the names under which they pleaded appear to have been inserted in the title of the cause. All the later proceedings in the case were had against them under their true names substantially in conformity with Section 1441 and the one just referred to, and evidently so by order of the court. The failure, if any, of the proper entry of any order made would only be a matter of correcting the

journal of the court to show the true proceeding taken. At the most the court having jurisdiction of the subject matter and of the persons of the defendants it was only an irregularity which affected no substantial rights of the defendants. The matter was not called to the attention of either Justice's or Circuit Court. Defendants' undertaking of bail and notice of appeal, presumably prepared by their counsel, both state the true names of the defendants and nothing more. If there was any error in this respect in the Circuit Court the defendants invited it and they cannot be heard to complain. The complaint charged, and they fully understood, the offense for which they were to answer. We review only the action of the trial court. This informality was not made the subject of inquiry there. It is now too late for the defendants to complain of that which did not prejudice their case.

2. It is contended on behalf of defendants that the Circuit Court upon the trial of the cause was exercising appellate jurisdiction and could impose no greater fine than that authorized to be adjudged by the Justice's Court. Section 2411, L. O. L., confers jurisdiction upon a Justice's Court of the crime of assault, and assault and battery, not charged to have been committed with intent to commit a felony, or in the course of a riot, or with a dangerous weapon, or upon a public officer in the discharge of his duties. Section 1924, L. O. L., as amended by Gen. Laws of 1911, p. 179, enacts:

"If any person not being armed with a dangerous weapon, shall assault another or shall commit any assault and battery upon another such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not less than $50 nor more than $500; provided, that in any case in which any per-

son shall be accused in a court of a justice of the peace shall, on motion of the district attorney, at any time before trial, either proceed to examine and dispose of the case as committing magistrate, either discharging the defendant or holding him to answer the charge before the circuit court, or proceed with the trial of the case as in other cases over which a justice's court has jurisdiction but if the defendant is convicted, the justice cannot impose upon such defendant any other or greater punishment than a fine of not less than $5.00 nor more than $50."

Under these sections a Justice's Court has concurrent jurisdiction with the Circuit Court in certain cases of assault and battery. Nevertheless the Justice's Court is authorized to impose upon the defendants no other or greater punishment than a fine of not less than $5.00 nor more than $50.00. According to the clear mandate of the statute, in any case of assault, or assault and battery, by any person not being armed with a dangerous weapon, the only penalty that can be inflicted is imprisonment in the county jail not less than three months nor more than one year, or a fine of not less than $50 nor more than $500, upon conviction in any court other than a Justice's Court: *Ex parte Martin,* 46 Fed. 482. This statute is the only authority the Circuit Court had to exercise in the cause and there was no error in complying with the enactment. In effect the lawmakers have said that in any case of assault or assault and battery of sufficient importance for the Circuit Court to take cognizance of, the punishment, if imposed, shall be greater than in those cases of a like nature where the law is administered by a Justice's Court. It may seem anomalous, but the regulation of the sentence is for the legislative department of the state. In its wisdom it has seen fit to place considerable discretion in the

district attorney as to the interests of the state in such cases. Upon appeal to the Circuit Court from a judgment of a justice of the peace in a civil action, a trial *de novo* is had. After an appeal is perfected the action is deemed pending and for trial therein as if originally commenced in the Circuit Court: Section 2463, L. O. L. Under Section 2509, L. O. L., as amended by Laws of 1913, p. 507, an appeal is taken in a criminal action in the same manner as in a civil action, except as to the mode of service of the notice and the giving of an undertaking for costs. In a note to Section 1924, *Ex parte Martin,* 46 Fed. 482, is recognized by Honorable W. P. Lord, the annotator, a former justice of this court, as authority for the construction of Section 1924, L. O. L., to the effect that the Circuit Court cannot impose a fine of less than $50. Any change in the long-established rule should be made by legislative enactment. The trial court had authority to impose the fine mentioned and the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued June 1, reversed July 3, 1917.

ALVORD *v.* BANFIELD.

(166 Pac. 549.)

Landlord and Tenant—Termination of Lease—Liability for Rent.

1. When the lessor terminated a lease, the lessee's liability to pay rent accruing thereafter was extinguished.

Landlord and Tenant—Termination of Lease—Covenants.

2. When the relations of landlord and tenant are at an end, and the lessee has surrendered and the landlord accepted the premises, thus putting an end to the lease, so far as the rights of the parties

are concerned, all covenants in favor of either are terminated at once, where no cause of action has accrued or matured during the life of the lease.

Landlord and Tenant—Surrender and Acceptance—Cause of Action for Diminished Rent.

3. In the absence of express covenant to the contrary, a landlord, after accepting a surrender of the premises, has no cause of action for damages against his former tenant by reason of diminished rent paid thereafter.

Bankruptcy—Recovery of Deposit from Lessor—Rescission of Lease—Deposit.

4. The trustees in bankruptcy of a lessee corporation, on surrender or rescission of the lease by the landlord when the lessee was not in default, were entitled to repayment by the landlord of the money deposited as security for payment of rent or performance of the covenants of the lease; if the lessee was in default, they were entitled to the deposit, less the amount of rent due and in arrears and compensation for preceding breaches of the lease.

Damages—Liquidated Damages or Penalty—Intention of Parties.

5. As a general rule, the intention of the contracting parties is an important, if not a conclusive, element in determining whether a sum stipulated to be paid in case of breach of contract is to be regarded as liquidated damages or a penalty.

Damages—Liquidated Damages or Penalty—Preference of Law.

6. The tendency and preference of the law is to regard a stipulation or covenant as of the nature of a penalty rather than as liquidated damages.

Damages—Liquidated Damages or Penalty.

7. Where there is an agreement to pay, for breach of contract, without regard to its date, a fixed unvarying sum, when, in the nature of things, the date of breach would be all-important in determining the element of actual damages, the stipulation is one for a penalty.

Damages—Liquidated Damages or Penalty.

8. If actual damages are neither doubtful, speculative, nor difficult of proof, and stipulated damages lose sight of the principle of compensation, the amount stipulated will be treated as a penalty.

Damages—Liquidated Damages or Penalty—Deposit by Lessee.

9. Where the lessee of an apartment house, deposited $2,500, which, by the lease, was "fixed and agreed upon as the full measure of damages * * in the event that said lessee * * shall violate any of the terms, covenants, or conditions" of the lease, which contained covenants for performance by the lessee of various acts, some of more and some of less importance, it being clear from the lease that the deposit was the lessee's property, as it was to be paid interest during such time as it should not be in default for breach of condition or covenant, the money was deposited as security for performance of the terms of the lease, and should be regarded as a penalty, not as liquidated damages.

Landlord and Tenant—Recovery of Deposit—Pleading.

10. In an action by the trustees in bankruptcy of a corporate lessee to recover a security deposit from the landlord, the complaint, alleging that a person executed the lease in his own name, as "and for" the agent of the corporate lessee, was not subject to demurrer, though its rhetoric was not perfect, in the absence of any denial of the facts asserted or other appropriate defense, particularly when considered with the averment that the lessee paid the money as a security deposit, showing the lease was executed in the transaction of the company's business.

Evidence—Charging Principal on Simple Contract—Parol Evidence.

11. Parol evidence is admissible to charge a principal on a simple contract not negotiable where the agent's name appears as principal, also to show the contract was executed with intent to bind the principal or for him.

Landlord and Tenant—Tenant's Action to Recover Deposit—Pleading —"Assume."

12. The complaint, which alleged that defendant, to whom the leased premises were sold subject to the lease, "assumed all the lessor's obligations thereunder, including the obligation of the original lessor with reference to the repayment of the deposit in said lease provided for," showed that defendant agreed to perform the conditions of the lease as to the deposit; "assume" meaning, in matters of law, to take upon oneself.

[As to damages recoverable by tenant in action for wrongful eviction, see note in Ann. Cas. 1912A, 860.]

From Multnomah: WILLIAM N. GATENS, Judge.

Action by W. C. Alvord, W. H. Beharrell and E. R. Corbett, trustees in bankruptcy of the estate of I. Gevurtz & Sons, against M. C. Banfield, to recover a deposit to secure the payment of rent.

From an order dismissing the action, plaintiffs appeal. Reversed.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action by the trustees in bankruptcy of the estate of I. Gevurtz & Sons, a corporation, to recover $2,500 deposited by the bankrupt as a forfeit in case of a breach of the conditions of a certain lease. The trial court sustained defendant's demurrer to the complaint and dismissed the action. Plaintiffs appeal.

After the formal allegations of the complaint as to the corporate character of I. Gevurtz & Sons, and the official status of plaintiffs, the complaint sets forth in substance the following facts: On March 6, 1911, Philip Gevurtz, acting as the agent of I. Gevurtz & Sons, entered into a lease with one George A. Housman of a certain three-story and basement apartment house known as number 730 Hoyt Street, in the City of Portland, Oregon, then in the course of construction, for a term of five years at a rental of $500 a month, aggregating $30,000. The lessee covenanted to pay promptly all charges and expenses for operating the premises leased, including charges for water, gas, fuel, heat, electric light, power, and telephone service used therein, and at his own expense to keep the interior and exterior of said premises, except as to the roof and foundation, in proper repair during the term of the lease. It was stipulated that all general repairs and alterations should be made by the lessee without any cost or expense to the lessor. A copy of the lease is made a part of the complaint. It is alleged that I. Gevurtz & Sons deposited with G. A. Housman the sum of $2,500 at the time of taking possession of the premises, as provided for in such lease; that Housman sold and transferred to defendant M. C. Banfield all his right, title, and interest in the leased premises subject to the demise and accounted to him for the deposit and Banfield assumed all the obligations of the original lessor under the terms of the lease. The agreement provided that for any failure of the lessee to fulfill any of the covenants of the lease the lessor might at his option terminate the lease and take possession of the premises. That part of the language of the instrument bearing upon the deposit is as follows:

"It is further agreed by and between the lessor and the lessee herein, that the sum of $2500 is hereby fixed and agreed upon as the full measure of demands for all claims or demands of said lessor against the said lessee in the event that said lessee, his heirs or assigns shall violate any of the terms, covenants or conditions of this lease, on his part to be observed and performed, or in the event the lessor herein may exercise any option given him under the terms of this lease whereby his lease shall be violated and forfeiture of the lease declared thereunder; which said sum of $2500 said lessee hereby agrees to pay to said lessor upon taking possession of the above described premises to be applied by said lessor at any time during the term of this lease as liquidated, fixed and agreed damages upon termination of the lease by option of lessor as herein provided, or for failure of the said lessee or those having his interests in the premises so to perform and observe the said terms, covenants and conditions or either of them. And the measure of damages against the said lessee or those having his interest in the premises shall be limited to the said sum of $2500, and he shall not be liable to the said lessor in any other sum for any breach of the conditions, covenants, or terms of this lease or upon a forfeiture of the said lease. Said lessor shall hold said $2500 during the term of this lease and shall pay to the lessee six (6%) per cent per annum interest therefor during time as the lessee shall not be in default for breach of condition or covenant. Said interest to be paid annually. And if lessee shall not be in default it shall be applied in payment of the last five months' rent, in which event the interest thereon shall cease five months before the end of said term. * *

"It is further understood and agreed by and between the lessor and the lessee herein, that in case the interest of the lessee or those having his interest in the premises shall be attached or attempted to be attached, sold under execution or attempted to be sold under execution, or a lien or interest acquired by a

third party to the interest of the lessee herein or those having his interest in the premises, including the possession or attempted possession of any person as a receiver of any court or by any other order of any court, or as a trustee in bankruptcy, then during the term in any of the above-mentioned events at the option of the lessor herein or those having his estate in the premises, this lease may be terminated and declared null and void and all rights of the said lessee or those having his interest in the premises and those claiming under him or them, as well as the right of any receiver, attaching creditor, execution purchaser or trustee in bankruptcy, to occupy the premises, shall immediately terminate and they or either of them, regarded as trespassers by the lessor or those having his interest in the premises."

The agreement also contained this stipulation:

"It is further understood and agreed that the lessor shall furnish gas ranges, window shades, electric fixtures and refrigerators at his own proper cost and expense before possession is delivered as provided hereinbefore. But such gas ranges, window shades, electric fixtures and refrigerators shall remain the property of the lessor and shall be maintained or replaced during the term of this lease by the lessee at his own cost and expense."

It it alleged that about April 25, 1913, M. C. Banfield terminated the lease, at which time no part of the $2,500 and the accumulated interest thereon had been or since has been applied on account of the last or of any rental whatever due under the terms of the lease, and that by reason thereof the plaintiffs herein are entitled to receive a return of the above sum with interest thereon at the rate of six per cent per annum from March 6, 1911, to date. The plaintiffs assert a demand and nonpayment. REVERSED.

For appellants there was a brief and an oral argument by *Mr. Chriss A. Bell.*

For respondent there was a brief over the name of *Messrs. Emmons & Webster,* with an oral argument by *Mr. Lionel R. Webster.*

MR. JUSTICE BEAN delivered the opinion of the court.

The demurrer to the complaint is a general one. In its support the defendant relies upon two points: (1) That the sum of $2,500 sought to be recovered in this action was liquidated damages and not a penalty; (2) that there was no privity of contract between the defendant and I. Gevurtz & Sons, the bankrupt named in the complaint. There is a paucity of expression as to the facts which might have some influence in determining whether the contract in question provides for liquidated damages or a penalty in the event of a breach of any covenant on the part of the lessee. The question is presented with much care and apparently after great research by the learned counsel for both parties; therefore, we are disinclined to pass the subject of our own volition. It is averred that defendant, M. C. Banfield, successor of the lessor, terminated the lease about April 25, 1913. It also appears that about that time I. Gevurtz & Sons, the party that made the deposit claimed, and was interested as lessee in the demised premises, was adjudged a bankrupt by order of the United States Court and plaintiffs were appointed as trustees of its estate. It may perhaps fairly be inferred by construing the language of the complaint most strongly against the pleader that the lessor's grantee, to whom we will refer hereafter as the lessee, had the right under the stipu-

lation quoted to terminate the lease and that he exercised that option. Briefly stated, the case comes to us with no showing of any actual damage to the landlord caused by any act of the lessee. No rent appears to be in arrears. Under these conditions and considering the stipulations of the lease we will proceed.

1. When the lessor terminated the lease as alleged in the pleading the liability of the lessee to pay rent accruing thereafter was extinguished: 24 Cyc. 1162; *Meagher* v. *Eilers Music House,* 77 Or. 70 (150 Pac. 266); *Carson* v. *Arvantes,* 10 Colo. App. 382 (50 Pac. 1080).

2. When the relations of landlord and tenant are at an end and the lessee has surrendered the premises and the landlord accepted the same and thus put an end to the lease, so far as the rights of the parties to it are concerned all covenants therein in favor of either party are at once terminated where no cause of action has accrued or matured during the life of the lease: 2 Underhill on Landlord and Tenant, pp. 1238, 1239; sec. 730; *Silva* v. *Bair,* 141 Cal. 599 (75 Pac. 102); *Deane* v. *Caldwell,* 127 Mass. 242, 248.

3. In the absence of express covenants to the contrary a landlord, after accepting a surrender of the premises, has no cause of action for damages against his former tenant by reason of diminished rent paid thereafter: *Meagher* v. *Eilers Music House,* 77 Or. 70 (150 Pac. 266); *Carson* v. *Arvantes,* 10 Colo. App. 382 (50 Pac. 1080).

4. The trustees of I. Gevurtz & Sons, who are successors to its interest, were entitled on a surrender or rescission of the lease to be repaid by the lessor the money deposited by the lessee as security for the payment of rent or for the performance of the cove-

nants of the lease, if the lessee was not then in default; or, if it was in default, to the deposit less the amount of rent due and in arrears, and compensation for preceding breaches of the contract: 1 Underhill on Landlord and Tenant, p. 594, § 378; *Meagher* v. *Eilers Music House,* 77 Or. 70 (150 Pac. 266); *Ladd & Bush* v. *Smith,* 6 Or. 316; *Cunningham* v. *Stockon,* 81 Kan. 780 (106 Pac. 1057, 19 Ann. Cas. 212); *Chaude* v. *Shepard,* 122 N. Y. 397 (25 N. E. 358); *Yuen Suey* v. *Fleshman,* 65 Or. 606 (133 Pac. 803, Ann. Cas. 1915A, 1072).

5–7. This brings us to the question: Was the $2,500 deposited as security for the performance of the covenants or was it under the stipulation of the demise liquidated damages? As a general rule the intention of the contracting parties is an important, if not a conclusive, element in determining whether a sum stipulated to be paid in case of the breach of a contract is to be regarded as liquidated damages or a penalty. Modern authorities attach greater importance to the meaning and intention of the parties than to the language of the clause designating the sum as a penalty or as liquidated damages: *Salem* v. *Anson,* 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169); *Wilhelm* v. *Eaves,* 21 Or. 194 (27 Pac. 1053, 14 L. R. A. 297). The tendency and preference of the law is to regard the stipulation or covenant as of the nature of a penalty rather than as liquidated damages, for the reason that then it may be apportioned to the actual loss sustained and compensation for such loss is the full measure of right and justice. Where the circumstances and the nature of the stipulation are such that the actual damages are not ascertainable with any degree of certainty the

rule stated does not apply. If there is an agreement for a fixed, unvarying sum, without regard to the date of the breach, when in the very nature of things the date of the breach would be all-important in determining the element of actual damages, the stipulation must be held to be one for a penalty: 8 R. C. L., § 114, p. 564; note, Ann. Cas. 1912C, p. 1025. In Section 115 of 8 R. C. L., p. 567, the author states:

"In other words, the damages stipulated for must be such as to amount to compensation only, and if the principle of compensation has been lost sight of the sum named will be treated as a penalty."

8, 9. Especially is this rule if the damages are neither doubtful, speculative, or difficult of proof. It has been held that the party claiming the amount stipulated for as damages must show by evidence *dehors* the contract that the amount so claimed approximates his actual damages: Id., § 117; note, Ann. Cas. 1912C, p. 1025. In the present case it is clear from the agreement that the $2,500 deposited was the property of the lessee and he was to be paid "interest therefor during such time as the lessee shall not be in default for breach of condition or covenant." It must follow that such amount would belong to the tenant until it was in some way forfeited to the landlord. The facts disclosed by the complaint do not indicate any such forfeiture. The lease specifies one certain sum designated in a portion thereof as liquidated damages. It contains covenants for the performance on the part of the lessee of various acts, some of more and some of less importance. The damages accruing from a breach of some of the stipulations, such as the failure to pay for the repair of a water-pipe or the use of water for a month, would be of easy ascertainment. According to the literal terms of the instrument

$2,500 is "fixed and agreed upon as the full measure of demands * * in the event that said lessee, * * shall violate any of the terms, covenants or conditions" of the lease. Possibly some of the stipulations belong to that class which justifies such an arrangement as to damages. From a reading of all the instrument it cannot be believed that a forfeiture of the whole sum was intended or contemplated by the contracting parties for a trivial or technical breach of the agreement, but rather that the money was deposited as security for the performance of the terms of the lease and that they stipulated for a penalty. Under the facts and circumstances disclosed in the case, although some of the language employed strongly evinces a contrary intent, the amount deposited and stipulated for should be regarded as a penalty and not as liquidated damages: *Wilhelm* v. *Eaves,* 21 Or. 194 (127 Pac. 1053, 14 L. R. A. 297); *Yuen Suey* v. *Fleshman,* 65 Or. 606 (133 Pac. 803, Ann. Cas. 1915A, 1072); *Hull* v. *Angus,* 60 Or. 95 (118 Pac. 284); *Carter* v. *Strom,* 41 Minn. 522 (43 N. W. 394); 2 Pom. Eq. Juris., § 443; 1 Sutherland on Damages, § 294; 3 Parsons on Contracts (9 ed.), p. 176; 19 Cent. Law Journal, 282–285.

10, 11. It is stated in the brief that the learned trial judge based his conclusion upon the second point of the demurrer. From a consideration of this phase of the case it appears from the complaint that Philip Gevurtz executed the lease in his own name as "and for" the agent of I. Gevurtz & Sons. The rhetoric of the pleading is not perfect. The faulty use of the word "for" does not leave the allegation meaningless or doubtful. It might subject the pleading to a motion to make more definite and certain, but the same cannot be ignored or held vulnerable to a demurrer es-

pecially when considered with the averment that I. Gevurtz & Sons paid the money as the deposit, thus showing that the contract was executed in the transaction of the business of the corporation. The weight of authority is to the effect that parol evidence is admissible to charge a principal on a simple contract not negotiable, where the name of the agent appears as the principal, and to show that the contract was executed with intent to bind the principal or for his benefit: 31 Cyc. 1659; *Barbre* v. *Goodale,* 28 Or. 465 (38 Pac. 67, 43 Pac. 378); *Anderson* v. *Portland Flouring Mills Co.,* 37 Or. 483 (60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235); *Riddle State Bank* v. *Link,* 78 Or. 498 (153 Pac. 1192); *Smith* v. *Campbell, post,* p. 420 (166 Pac. 546), filed June 26, 1917. In the absence of any denial of the facts asserted or other appropriate defense the plaintiffs should recover. It is contended on behalf of defendant that he is not liable to anyone upon the assertion of the plaintiffs that Housman the original lessor accounted to defendant Banfield for the deposit when the property was conveyed to him. But the allegation of the complaint goes further than this and sets forth that the defendant to whom the leased premises were sold subject to the lease, "assumed all the lessor's obligations thereunder, including the obligation of the said George A. Housman, the original lessor, with reference to the repayment of the deposit in said lease provided for." The word "assumed" in matters of law is "to take upon one's self." "'Assume' means to undertake, engage or promise": 1 Words and Phrases, 586, 587.

12. The complaint, therefore, shows that defendant agreed to perform the conditions of the lease as to the deposit. The demurrer to the complaint should have been overruled; *Strode* v. *Smith,* 66 Or. 163 (131 Pac.

1032). It follows that the judgment of the Circuit Court must be reversed and it is so ordered.

REVERSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued May 9, affirmed June 6, rehearing denied July 10, 1917.

ROGERS *v.* MALONEY.*

(165 Pac. 357.)

Indians—Lease by Allottee—Approval—"Condition Precedent."

1. A provision in a lease by an Indian allottee that it should become binding only after approval by the Indian reservation superintendent, or Secretary of the Interior, is a "condition precedent."

Contracts—"Condition Precedent."

2. A "condition precedent" is a condition which calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, and before the contract shall take effect.

Frauds, Statute of—Parol—Modification.

3. Ordinarily, an agreement within the statute of frauds cannot be varied by parol.

Frauds, Statute of—Parol—Modification—Estoppel.

4. Where a parol modification of a lease has been acted upon by a party to his disadvantage, the other party cannot set up the statute of frauds and stand on the original agreement.

Indians—Lease—Approval—Conditions Precedent—Waiver.

5. Where a lease by an Indian allottee provided that it should not become effective until approved, evidence that the lessee advanced the lessor money, furnished supplies, and did some work on the property, all in reliance upon the lease, makes the lessor's waiver of the condition regarding approval, etc., a jury question.

[As to waiver of forfeiture of lease, see note in 47 **Am. St. Rep.** 197.]

From Umatilla: GILBERT W. PHELPS, Judge.

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*On the question of statute of frauds as affecting parol modification of instrument, see notes in 28 **L. R. A. (N. S.)** 876; **L. R. A.** 1917B, 144. REPORTER.

An action of forcible entry and detainer by Frank Rogers against James W. Maloney, wherein a judgment was entered on a verdict of a jury in favor of plaintiff and defendant appealed. Affirmed.

In Banc. Statement by MR. JUSTICE MCCAMANT.

This is an action of forcible entry and detainer which involves plaintiff's right to the possession of a quarter-section of land in the Umatilla Indian Reservation in Umatilla County. Prior to September 30, 1916, the land was in the undisputed possession of the defendant, under a lease from Ellen Darr, the Indian allottee. On June 1, 1916, a new lease was given by Mrs. Darr to the defendant, running from October 1, 1916, to September 30, 1920. This lease contained the following clause:

"It is further understood and agreed by the parties hereto that this lease shall be valid and binding only after approval by the Superintendent or other officer in charge of the Umatilla Indian Reservation, or by the Secretary of the Interior."

The lease has never been so approved, nor did the lessor at any time make a new agreement in writing which made the lease effective, notwithstanding the condition created by the foregoing covenant. Under date of May 4, 1916, a patent was issued to Mrs. Darr for the property in question, pursuant to the provisions of the Act of May 8, 1906 (34 Stats. at Large, 182), and she thereupon became vested with entire control over the property and with the right to convey or lease the same without approval of any official. This patent reached the superintendent of the Umatilla Reservation on June 25th and was delivered to Mrs. Darr on July 3d. The lease under which the defendant claims the property was executed in ignorance of

the existence of the patent. Subsequently, and on September 16, 1916, Mrs. Darr executed a lease of this same property to plaintiff for a period of ten years after the expiration of defendant's lease, which was then effective. Plaintiff claims that he has been entitled to the possession of the property at all times subsequent to October 1, 1916, under the operation of this lease. He undertook to take forcible possession of the property on October 17 and 18, 1916, but the defendant withheld possession from him and he thereupon brought this action. The defendant contends that the condition in the lease above quoted was waived by Mrs. Darr. The case was tried before a jury. A verdict was rendered in favor of the defendant, on which judgment was entered, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Messrs. Raley & Raley,* with an oral argument by *Mr. J. H. Raley.*

For respondent there was a brief over the names of *Messrs. Fee & Fee* and *Messrs. Carter & Smythe,* with oral arguments by *Mr. James A. Fee* and *Mr. Charles H. Carter.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1–4. The clause in defendant's lease providing that it shall be binding only after approval by the superintendent of the Indian Reservation, or by the Secretary of the Interior, is a condition precedent; *Wellsville Oil Co.* v. *Miller,* 44 Okl. 493 (145 Pac. 344), 243 U. S. 6 (61 L. Ed. —, 37 Sup. Ct. Rep. 362). A condition precedent is a condition which calls for the performance of

some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect: 8 Cyc. 558. Defendant's lease was therefore ineffective unless the foregoing condition was waived: *Johnson* v. *Warren*, 74 Mich. 491, 497 (42 N. W. 74); *People* v. *Center*, 66 Cal. 551 (5 Pac. 263, 6 Pac. 481, 485). The defendant's lease, being for a longer period than one year, is within the statute of frauds: Section 804, 808, L. O. L. The general rule is that an agreement within the statute of frauds cannot be varied by parol: *Neppach* v. *Oregon Co.*, 46 Or. 374, 395 (80 Pac. 482, 7 Ann. Cas. 1035); *Kingsley* v. *Kressly*, 60 Or. 167, 173 (111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746); *Caples* v. *Morgan*, 81 Or. 692, 704 (160 Pac. 1154). If the modification made by parol has been acted upon by the parties and the position of one of them has been changed for the worse in reliance on the modification, the other party will be denied the right to set up the statute of frauds and stand on the original agreement: *Neppach* v. *Oregon Co.*, 46 Or. 374, 395 (80 Pac. 482, 7 Ann. Cas. 1035); *Kingsley* v. *Kressly*, 60 Or. 167, 173 (111 Pac. 385, 118 Pac. 678, Ann. Cas. 1913E, 746). This principle of law is clearly set out by the Supreme Court of California:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. * *

"We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.' It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson* v.

Colgrove, 100 U. S. 580 (25 L. Ed. 618), and quoted therefrom in *Carpy* v. *Dowdell,* 115 Cal. 677, 687 (47 Pac. 697), as follows: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both' ": *Seymour* v. *Oelrichs,* 156 Cal. 782 (106 Pac. 88, 94).

To the same effect see: *Smiley* v. *Barker,* 83 Fed. 684, 687 (28 C. C. A. 9).

5. The question with which we are concerned in this case is whether Mrs. Darr waived the condition precedent and thereby made the defendant's lease effective. In 29 Am. & Eng. Enc. of Law, p. 1103, it is said:

"A person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it."

In Bishop on Contracts, Section 792, the principle is stated thus:

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward."

Do the facts in the case at bar bring the defendant within the principle announced in the foregoing authorities?

It appears that on June 3, 1916, the defendant indorsed the lessor's note for two hundred dollars to the First National Bank of Pendleton. The defendant

testifies that he did this solely in reliance on the lease. This note remained unpaid at the time when plaintiff undertook to take forcible possession of the property. It was paid by Mrs. Darr on October 21st. On September 7, 1916, the defendant gave Mrs. Darr thirty dollars; the check by which the money was paid contained the words, "advance on lease," and the defendant testified that he paid this money on account of the rentals which would become due under the lease. On October 21, 1916, Mrs. Darr deposited the sum of thirty dollars to the credit of the defendant with the defendant's bankers. The defendant declined to accept the money. The bank thereupon put it in the form of a certificate of deposit and sent it to Mrs. Darr. The certificate had not been cashed at the time when the case was tried. Some testimony was offered on behalf of the defendant to the effect that at the time when this thirty dollars was paid to Mrs. Darr she said to the defendant that the defendant "need not fear the lease. It was a good one and if it was not satisfactory she would make it satisfactory." About this same time, on Mrs. Darr's application, the defendant gave her a load of hay and two sacks of barley. The defendant testified that he did this in reliance upon the lease of date June 1st. This lease obligated the defendant to do some fencing on the property. It appears that the defendant hauled three loads of posts for this purpose from Mrs. Darr's cabin twenty-five miles distant, using for such purpose two six-mule teams and one two-mule team. It took two days for each team to make the trip.

We think that these facts were sufficient to go to the jury on the question of waiver. It has been twice held by this court that by the acceptance of a premium and the issuance of a policy an insurance company is es-

topped to set up a condition in the policy under the operation of which the policy was never at any time effective: *Allesina* v. *London Ins. Co.*, 45 Or. 441 (78 Pac. 392, 2 Ann. Cas. 284); *Arthur* v. *Palatine Co.*, 35 Or. 27, 31 (57 Pac. 62, 76 Am. St. Rep. 450). Since these cases were decided the legislature has provided a standard form of fire insurance policy and the law of waiver announced in these decisions is for that reason no longer applicable to similar states of fact: *Oatman* v. *Bankers' Fire Relief Assn.*, 66 Or. 388, 393, 394 (133 Pac. 1183, 134 Pac. 1033). The principle announced in the Allesina and Arthur cases is still regarded as sound wherever applicable. We think that the principle is controlling in this case, and that the lower court did not err in denying plaintiff's motion for a directed verdict.

The instructions requested by plaintiff did not recognize the principles of the law of waiver hereinbefore set forth. While they correctly stated the general principle that a contract within the statute of frauds cannot be varied by parol, they would have misled the jury and were properly refused. The evidence admitted over the objection of plaintiff tended to prove the waiver which the defendant was entitled to prove, and the court did not err in admitting the testimony. The judgment is affirmed.

AFFIRMED. REHEARING DENIED.

Argued May 15, reversed and decree rendered June 12, rehearing denied July 10, 1917.

STEWART *v.* MANN.

(165 Pac. 590, 1169.)

Contracts—Discharge by Bankruptcy.

1. Where an orchard company, which had contracted to sell orchard lands, went into bankruptcy, the bankruptcy did not impair the obligations of the company's contract with its vendee, nor lessen his privileges under it, and did not foreclose his interest in the land; he not being compelled to take title on less favorable terms than those for which he stipulated.

Vendor and Purchaser—Assumption of Vendor's Liabilities.

2. Where an orchard company contracted to sell orchard lands the contract containing stipulations, and went into bankruptcy, and a third person purchased the lands of the orchard company subject to the liens and encumbrances of its prior contracts of sale, expressly agreeing to assume them as part of the purchase price, the third person placed himself precisely in the situation of the company at the outset of the transaction between it and its vendee, and was bound to perform the company's covenants; if he desired to avoid such result, he should have foreclosed his contract with the party who with himself originally owned the land as tenants in common, whereby he might rid his own half of the land of the obligations of his agreement to sell his half to his cotenant, who organized the orchard company.

Vendor and Purchaser—Breach of Contract by Vendor's Successor.

3. Where one cotenant agreed to sell orchard lands to another, and the latter organized an orchard company and conveyed the whole tract to it, and it contracted to sell to plaintiff on certain terms and became bankrupt, the first cotenant buying the lands at trustee's sale subject to the company's contracts of sale, expressly assuming them, and plaintiff vendee preferred a claim for damages for the neglect of the company and the first cotenant to cultivate the orchard lands as required by the orchard company's contract to sell, and the first cotenant repudiated the obligations originally resting upon the company, his conduct constituted what plaintiff was entitled to consider a breach of the contract to sell the orchard lands.

[As to estoppel on purchaser to impeach obligation of vendor that he has assumed, see note in **Ann. Cas.** 1914A, 185.]

Vendor and Purchaser—Foreclosure of Vendee's Lien.

4. A vendee acquires an estate in land under an executory contract of sale in proportion as he pays the purchase price and is not in default in performance of his covenant; the vendor holding the legal title to such extent in trust for the vendee. When the seller repudiates or fails to perform, the vendee has the right to get out of the land what he put into it by foreclosing his vendee's lien.

Vendor and Purchaser—Rescission—Placing in Statu Quo.

5. Where land was contracted to be sold, and, on the vendor corporation's bankruptcy, an original owner of the lands as cotenant bought at trustee's sale, subject to the company's contracts to sell, expressly assuming such liens and encumbrances, when such purchaser sought to rescind the company's contract to sell, he should have put the buyer *in statu quo.*

ON PETITION FOR REHEARING.

Vendor and Purchaser—Foreclosure of Vendee's Lien—Effect of Denial of Liability.

6. Where vendor had absolutely denied any liability under and repudiated contract with vendee in proceedings for foreclosure of vendee's lien, vendor could not claim vendee's failure to cultivate premises as agreed upon.

From Washington: GEORGE R. BAGLEY, Judge.

Suit by Walter P. Stewart against S. M. Mann, Minerva F. Mann and the Pacific Trust Association, Limited, a corporation. From a conditional decree favoring defendants Mann, plaintiff appealed. Reversed and decree entered as prayed for in complaint, except as to interest only from date of decree.

Department 2. Statement by MR. JUSTICE BURNETT.

This is a suit to foreclose a vendee's lien upon realty described as Tract 54 and the east 110 feet of Tract 53, of the Chehalem Mountain Orchards. It appears from the record that in May, 1910, the defendant Mann and one Reimers were the owners as tenants in common of some land of which the above-mentioned parcels are a part. At that time Mann contracted in writing to sell his moiety to Reimers on certain terms. While the title was in this condition Reimers organized the Chehalem Mountain Orchards Company, a corporation, and to it deeded the whole tract. The company in turn entered into a contract with the plaintiff to convey to him the parcels first mentioned. He was to pay certain installments quarterly. The company on its part, among other things, was to maintain

and care for the orchards upon the land "in a scientific manner, by approved methods, and to replace all trees that failed to grow within four years from the date of the agreement," and the plaintiff was let into possession. Subsequently the company went into bankruptcy and at a sale by the trustee the defendant Mann bought in the whole property, including that which the plaintiff had agreed to purchase, and took from the trustee a deed which recited all the encumbrances upon the tract, and the fact that designated parts of it were subject to certain contracts of sale, embracing the one here in dispute, and contained this condition,

"all of which liens and encumbrances as above set forth the party of the second part (Mann) for himself, his heirs, executors, administrators, and assigns, hereby expressly agrees to assume as a part of the purchase price thereof."

The plaintiff paid various installments of the purchase price, some to the company, subsequently others to the trustee, and finally still others to the defendant Mann, in pursuance of the latter's notification and that of the trustee, all in due time as required by his contract. There were yet other installments to be paid but at the time he made the last payment to Mann, Stewart did so under protest and claimed to him that neither he nor the company had properly complied with the stipulation for the cultivation and establishment of the orchard, and contended that there should be an abatement of the purchase price to cover these shortcomings. Mann responded by returning to the plaintiff all money which the latter had paid directly to him, and repudiated any obligation on his part to make good the fault of the company respecting the orchard. This suit followed by which Stewart seeks to impress upon the land a lien in his favor for all the

money he has paid, after deducting the amount returned to him by Mann.

The defendant answering recites the history of the transactions and claims to have bought the land free of all obligations whatever on his part to sell the same to the plaintiff, and says further that they entered into an oral contract after the trustee's sale whereby he agreed to transfer the title to the plaintiff upon payment of the sums described in his contract with the company, but that the plaintiff after having made several payments to Mann refused to pay further, whereupon the latter returned to the former all the payments he had made to Mann directly, which the plaintiff has retained ever since, with the result, as Mann contends, that the latter is the owner in fee simple of the property. He alleges, however, that he is willing to convey the land to the plaintiff when the latter pays the amount stipulated by the oral agreement.

The reply traverses the answer. The Circuit Court entered a decree substantially requiring specific performance on the part of Mann, conditioned upon Stewart's finishing the payments mentioned in the contract with the company, but that in default thereof plaintiff should be utterly foreclosed of all title and that Mann should be considered the owner in fee simple. The plaintiff has appealed.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. George Arthur Brown* and *Mr. Ray B. Compton,* with an oral argument by *Mr. Brown.*

For respondents, S. M. Mann and Minerva F. Mann, there was a brief and an oral argument by *Mr. Leroy Lomax.*

No appearance for respondent, Pacific Trust Association, Limited.

MR. JUSTICE BURNETT delivered the opinion of the court.

1–3. The bankruptcy of the company did not impair the obligations of the contract with the plaintiff, nor lessen his privileges under the same. It did not foreclose his interest in the land. He was not compelled thereby to take title on less favorable terms than those for which he stipulated. In buying at the sale and taking the conveyance from the trustee with the condition inserted therein, as above quoted, Mann placed himself precisely in the situation of the company at the outset of the transaction between it and the plaintiff. The defendant contends that Reimers did not assign to the company his contract for the purchase of Mann's undivided half of the land. That, however, cannot avail Mann in the present juncture, for he took the deed mentioned with the condition stated, and this binds him to perform the covenants of the company. If he had desired to avoid this result it was his business to foreclose his contract with Reimers whereby he might have rid his own half of the land of the obligations of the agreement between himself and Reimers. With them would have fallen plaintiff's interest in the Mann half for that interest depended upon and was derived from the Reimer's contract. Mann avoided this course, however, and bought in the whole tract on the terms already described, which estops him from shirking the obligations of the company under its covenant with the plaintiff: *Cummings* v. *Jackson,* 55 N. J. Eq. 805 (38 Atl. 763); *Hill* v. *Minor,* 79 Ind. 48; *Crawford* v. *Edwards,* 33 Mich. 354; *Miller* v. *Thompson,* 34 Mich. 10; *Goos* v. *Goos,* 57 Neb. 294 (77 N. W.

687); *Hadley* v. *Clark,* 8 Idaho, 497 (69 Pac. 319); *Selby* v. *Sanford,* 7 Kan. App. 781 (54 Pac. 17); *Mississippi Valley Trust Co.* v. *Hofius,* 20 Wash. 274 (55 Pac. 54). The result is that the situation is equivalent to that existing between the company and the plaintiff at the outset. The plaintiff was not in default in his payment. He preferred a claim for damages for the neglect of the company and of Mann to cultivate the orchard as required by the contract. This was not a breach of the stipulation on the part of the plaintiff. It is not necessary to determine whether the demand was well or ill founded. However, it seems to have provoked the defendant Mann to repudiate the obligations originally resting upon his predecessors in title, something he had no right to do, having assumed them as already shown. His conduct constitutes what Stewart is entitled to consider a breach of the contract on the part of Mann. In the language of Mr. Justice VANN, in *Elterman* v. *Hyman,* 192 N. Y. 113 (84 N. E. 937, 127 Am. St. Rep. 862, 871, 15 Ann. Cas. 819), as applied to Stewart:

"He accepts 'the situation which the wrongdoing of the other party has brought about,' and tries to get out of the land what he paid on it under the contract. * * The vendee does not rescind when without fault he goes into a court of equity and insists on a right springing from the contract and payment thereon pursuant to its terms. He does not repudiate the contract, but stands on it and affirms it as the foundation of the right he seeks to enforce, as fully as if he sought entire specific performance. He does not abandon his equitable ownership by trying to assert it in the only way that it can be asserted. The contract has been performed by him, wholly it may be, or in part, as in the case before us, and as, owing to the fault of the vendor, he cannot have the full performance to which he is entitled, he asks for partial performance by the

enforcement of the trust created by the contract and payment as provided thereby. He does not sue for money had and received, but to enforce a lien on land into which the money went. Nor does he rescind the contract, which is the source of his lien, by seeking to enforce it to the only extent now possible, owing to the breach by the vendor, but he demands that equity should give him the interest in the land that he acquired by the contract and payment. The denial of that right would be an encouragement to wrongdoing, and to hold that an attempt to foreclose the equitable lien is a rescission of the contract would deny the right in all cases, including those in which the vendee is in possession and has made improvements."

4. The doctrine of the cases is to the effect that a vendee acquires an estate in land under an executory contract for the purchase of the same in proportion as he pays the purchase price and is not in default in the performance of his covenant. The vendor holds the legal title to that extent in trust for the vendee. When the seller repudiates or fails to perform the contract the vendee has the right to get out of the land what he put into it, by foreclosing his equitable lien upon the premises. His right to do so is well recognized by the authorities: *Gerstell* v. *Shirk,* 210 Fed. 223 (127 C. C. A. 41); *Howard* v. *Linnhaven Orchard Co.,* 228 Fed. 523; *Brede* v. *Rosedale Terrace Co.,* 158 App. Div. 438 (143 N. Y. Supp. 583); *Stockwell* v. *Melbern* (Tex. Civ.), 185 S. W. 399; *Tyler* v. *Cate,* 29 Or. 515 (45 Pac. 800); *Feldblum* v. *Laurelton Land Co.,* 151 App. Div. 24 (135 N. Y. Supp. 349); *Ihrke* v. *Continental Life Ins. & Invest. Co.,* 91 Wash. 342 (157 Pac. 866). This latter case is one almost precisely like the instant contention in every particular. The subject is treated in a very exhaustive opinion written by Mr. Justice FULLERTON, of the Washington Supreme Court, and is well

worth reading in connection with the matter involved.

5. When Mann sought to rescind the contract he should have put the plaintiff *in statu quo;* he did this only in part, by merely returning what the plaintiff had paid directly to him. Stewart had a right to accept the situation thus thrust upon him and, by foreclosing his vendee's lien, compel the defendant Mann, so far as his rights in the premises were involved, to make complete restoration to the plaintiff, so as to place him where he was in the beginning; in other words, to complete the process of rescission by repayment of the full sum the plaintiff had already invested in the land. The result is that the decree of the Circuit Court is reversed and one here entered in accordance with the prayer of the complaint, except that no interest can be allowed prior to the date of this decree: *Sargent* v. *American Bank & Trust Co.,* 80 Or. 16 (154 Pac. 759, 156 Pac. 431). REVERSED. DECREE RENDERED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Denied July 10, 1917.

ON PETITION FOR REHEARING.

(165 Pac. 1169.)

Mr. Leroy Lomax, for the petition.

Mr. George Arthur Brown, contra.

Department 2. MR. JUSTICE BURNETT delivered the opinion of the court.

6. The defendant's petition for rehearing would be very persuasive if it were founded upon a correct

premise. It charges in substance that the plaintiff sought to compel the admission from the defendant that both he and his predecessor in interest had violated the terms of the contract under which the plaintiff was to purchase the property in that they had not cultivated the orchard on the premises in the manner prescribed. This, however, is not the ground upon which the defendant placed his return of the money and his abjuration of the contract.

It will be remembered that Stewart protested at the time he made the last payment and claimed that the defendant and the company had failed to comply with the stipulations of the contract for the cultivation and establishment of the orchard and that there should be an abatement of the purchase price to cover the default. As showing the position which the defendant took it is only necessary to quote his letter dated July 14, 1914, addressed to the plaintiff, saying:

"Inclosed herewith I hand you check $79.15 which you sent me July 2nd. I also enclose a certified check for the sum of one hundred and sixty dollars and sixty cents, being the amount of the payments made by you to me heretofore on your contract with Chehalem Mountain Orchard Company on account of tracts fifty-four and part of tract fifty-three, as provided in your contract.

"You are certainly very much mistaken in your conclusion in this matter. When I purchased the land from the trustees in bankruptcy, I by no means assumed the payment of the debts of the bankrupt, and you have no right to believe or think so, from anything I have ever said or done. I gave you to understand that I was willing to assume your contract as a separate individual contract and deal between ourselves; that is, I was willing to deed you the land making you a good title upon the payment to me of the balance due under your contract. I could sell the land for more money than is due under your contract, or

think I could do so, but I was willing to let you have the land for the amount yet due under your contract but I certainly did not assume the debt of the bankrupt. You can readily see that one would be very foolish to do such a thing, and you have no right to expect such a thing from me.

"You say in your letter that you intend to institute suit against me to recover money which you paid the Chehalem Mountain Orchards Company under your contract. You should have presented any claim you had against the company to the referee in bankruptcy, as no one assumed those liabilities, and you never heard of any one assuming the liabilities of a bankrupt in purchasing the assets of one who has gone into bankruptcy. Because of your misunderstanding of the matter I am returning the money to you and I certainly would not let you have the land for the amount yet due under your contract with the bankrupt, and in addition to that make good any amounts you had lost on the bankrupt.

"Yours respectfully,
"(Signed) S. M. MANN."

It will be recalled that the land was sold by the trustee in bankruptcy subject to the contract and that the defendant accepted a deed containing the condition to the effect that he himself expressly agreed to assume as part of the purchase price the encumbrances upon the property, including the contract in question. His letter above quoted constitutes a repudiation of his covenant. He did not justify his course at that time by the assertion that he and his predecessor had complied with the contract, but proceeded on the basis of there being no liability whatever on his part. Whatever his reason may be he committed a breach of the contract in his renunciation of it. He cannot at this time mend his hold and take up the question of whether or not the orchard was cultivated as agreed upon. Having denied any liability in any event he

must abide by his position thus assumed. The deed he had taken made him liable and when he disavowed that liability the plaintiff was entitled to consider it as a breach and to proceed in foreclosure of his vendee's lien upon the premises. The petition for rehearing is denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued May 16, affirmed June 12, rehearing denied July 10, 1917.

THARP v. JACKSON.

(165 Pac. 585, 1173.)

Executors and Administrators—Action on Quantum Meruit—Evidence.

1. In an action on a *quantum meruit* for services rendered a decedent as stenographer, testimony that an agreement was made between the decedent and plaintiff whereby he agreed to pay her $50 a month for her services, the entire payment to be made five years after she entered his service, was admissible as material to the measurement of damages.

Evidence—Declarations of Decedent—Statute.

2. Such testimony was admissible under Section 710, L. O. L., providing that the declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest.

Witnesses—Declarations of Decedent—Plaintiff as Witness to Declarations—Statute.

3. Plaintiff was entitled to testify to decedent's declarations under Section 732, L. O. L., specifying persons who cannot testify.

Witnesses—Action Against Administratrix—Declarations of Decedent—Admissibility.

4. Plaintiff's testimony as to decedent's declarations made the declarations admissible on behalf of defendant administratrix.

[As to waiver by personal representative of incompetency of witness to testify as to transactions with the deceased, see note in Ann. Cas. 1913A, 682.]

Executors and Administrators—Action for Services—Evidence.

5. In the absence of evidence that all business transactions at decedent's office were noted on certain calendars for the years 1909 to 1913, inclusive, the calendars, on which decedent had made notations of the business transacted in his office from day to day, there being many days on which no notations were made, had no tendency to prove the small volume of work done at the office, and were properly excluded.

Executors and Administrators—Action on Quantum Meruit—Evidence as to Value of Services.

6. In an action on a *quantum meruit* against decedent's administratrix for services rendered decedent as stenographer, though evidence of a contract between plaintiff and decedent was admissible, the agreement was not indispensable to recovery by plaintiff, and plaintiff was entitled to have the jury consider other testimony bearing on the reasonable value of her services.

Limitation of Actions—Statute of Limitations—Deferred Payment.

7. Where a stenographer agreed to work for decedent for $50 a month, payable at the end of five years, the payment did not become due until such time, and the statute of limitations did not run on the stenographer's cause of action until six years thereafter.

Executors and Administrators—Rendition of Services—Sufficiency of Evidence.

8. In a stenographer's action against an administratrix for services rendered decedent, evidence *held* sufficient to sustain verdict for plaintiff.

ON PETITION FOR REHEARING.

Executors and Administrators—Action on Claim—Condition Precedent—Presentation.

9. An action at law on a claim against an estate must be based on the same claim as that presented to deceased's personal representative.

Executors and Administrators—Action on Claim—Previous Presentation.

10. Where plaintiff's action against an estate for personal services was for the same amount and services as her claim presented to the administratrix, it was not defeated by the fact that evidence on which she relied was not stated in the claim.

From Douglas: JAMES W. HAMILTON, Judge.

Action by Ada Tharp against Aura D. Jackson, administratrix of the estate of C. S. Jackson, deceased, in which a judgment was rendered upon a verdict in favor of plaintiff, and defendant has appealed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action against defendant as administratrix of the estate of C. S. Jackson, deceased, brought to recover the sum of $2,161.53 alleged to be due plaintiff for services rendered the decedent between February 10, 1908, and December 23, 1913. Plaintiff alleges that between these dates she officiated as stenographer and office clerk in Mr. Jackson's office and that her services were reasonably worth the above sum for which she asks judgment. The answer denies the rendition of the services and affirmatively pleads the statute of limitations, and payment.

The jury found for the plaintiff in the sum of $550. From a judgment in plaintiff's favor following the verdict, the defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Neuner & Wimberly,* with an oral argument by *Mr. George T. Neuner.*

For respondent there was a brief over the names of *Mr. Henry T. Bagley, Mr. Arthur Langguth* and *Mr. John T. Long,* with oral arguments by *Mr. Bagley* and *Mr. Langguth.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. Error is assigned on the admission of evidence over the defendant's objection to the effect that an agreement was entered into between C. S. Jackson and plaintiff whereby he agreed to pay her $50 a month for her services, the entire payment to be made five years after she entered his services. This testimony is objected to on the ground that the action is based on

quantum meruit and that evidence of a contract on the subject constitutes a variance. It is well settled in this jurisdiction that such testimony is admissible as material to the measure of damages: *West* v. *Eley,* 39 Or. 461, 465 (65 Pac. 798); *Chamberlain* v. *Townsend,* 72 Or. 207, 213 (142 Pac. 782, 143 Pac. 924).

2. This evidence is also objected to on the ground that the declarations of a decedent are inadmissible against his personal representatives except where they relate to his real property. The testimony was admissible under the express provisions of Section 710, L. O. L., which is as follows:

"The declaration, act, or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

3, 4. Plaintiff was entitled to testify to the declarations of the deceased under Section 732, L. O. L. Her testimony on the subject made the declarations of the deceased admissible on behalf of the defendant and the Circuit Court was liberal in admitting his declarations offered by the defendant.

5. On plaintiff's objection the court excluded calendars for the years 1909 to 1913 inclusive, on which the deceased had made certain notations of the business transacted in his office from day to day. There were many days on which no notations were made on the calendars. The claim of the defendant with reference to this testimony is defined in the offer of her counsel:

"We offer these calendars in evidence as entries made in the regular course of business by the deceased. The purpose is to show the dates on which he worked at his office and when he was at his ranch and the amount of work that was carried on at the office, as going to show the amount of work, for the purpose of

showing the reasonable value of services performed by the plaintiff."

The calendars had no tendency to prove the small volume of work done at the office in the absence of evidence that all business transacted at the office was noted on the calendars. The bill of exceptions contains no such evidence. The calendars were properly excluded.

Before bringing this action plaintiff presented her claim to the defendant as administratrix and the claim was rejected. It is provided by Section 1241, L. O. L., that in such case the claim shall not be allowed by a jury "except upon some competent or satisfactory evidence other than the testimony of the claimant." This statute has been construed by this court in *Goltra* v. *Penland,* 45 Or. 254, 264 (77 Pac. 129). The instructions given by the Circuit Court were in harmony with this construction of the statute and it was not error to refuse defendant's requests one, three and seven, which were directed to this same subject.

6, 7. The defendant's fifth request asked the court to charge that plaintiff could not recover unless she proved the contract with the deceased to which she testified. The sixth request was an instruction to disregard the evidence of the reasonable value of plaintiff's services if the jury should find that an agreement was entered into. Both of these requests were properly refused. The action was on *quantum meruit.* While evidence of the agreement was admissible, the agreement was not indispensable to a recovery by plaintiff. Plaintiff was entitled to have the jury consider other testimony bearing on the reasonable value of her services.

Plaintiff testified that under her arrangement with the deceased her compensation was not to become due

until February 10, 1913. Her testimony was to the effect that Mr. Jackson had a number of large cases which he did not expect to finish for several years and that therefore this unusual arrangement was made on the subject of her compensation. The defendant pleaded the statute of limitations. The court instructed the jury as follows:

"You can consider the agreement for another purpose and that is to determine when, if at all, any amount became due * * under her agreement if she had any. Now, the law would provide that for her work if the amount became due, as alleged in the defendant's answer, and six years had elapsed before the commencement of the action, although she had earned it, she could not recover because the statute of limitations would apply and defeat the action; but if the payment was deferred, then of course it would not become due until such time as the agreement provided for."

This instruction correctly stated the law.

8. The defendant moved for a nonsuit and for a directed verdict. These motions were based chiefly on the contention that there had not been sufficient corroboration of plaintiff's testimony to entitle her to a verdict. A number of witnesses testified that she performed services for the deceased and his letters to her justified the inference that she was to be paid for these services. There was also received in evidence a check drawn by the deceased in favor of plaintiff on which was written, "In full of all claims to date." This check was dated April 18, 1914; it was cogent evidence that plaintiff had a claim against the deceased on that day. The check was for $30 and plaintiff had refused to accept it. There was sufficient corroboration of plaintiff's testimony to sustain a verdict in her favor

and the court did not err in submitting the case to the jury.

We find no error and the judgment is affirmed.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Denied July 10, 1917.

ON PETITION FOR REHEARING.

(165 Pac. 1173.)

Messrs. Neuner & Wimberly, for the petition.

Mr. John T. Long, Mr. Henry T. Bagley and *Mr. Arthur Langguth, contra.*

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

Appellant's petition for rehearing reargues the matters determined in the former opinion and presents with much force a question which was passed upon by us only inferentially. The claim presented to the administratrix does not set out the agreement testified to by plaintiff to the effect that she was not to be paid for her services until five years after she entered the office of the deceased. It is contended that the failure to mention this agreement in the claim precludes its assertion by plaintiff in this action. It has been held that if the claim presented shows on its face that claimant has no cause of action, the claim cannot be the basis of a successful litigation with the executor: *Wilkes* v. *Cornelius,* 21 Or. 348, 352 (28 Pac. 135); *McGrath* v. *Carroll,* 110 Cal. 79 (42 Pac. 466,

468). The action at law must be based on the same claim as that presented to the personal representatives of the deceased: *Wilkes* v. *Cornelius* and *McGrath* v. *Carroll, supra, Etchas* v. *Orena,* 127 Cal. 588 (60 Pac. 45). Within the rule announced by these authorities we think that plaintiff's claim presented to the administratrix is sufficient to sustain the judgment she has recovered. It was held by this court in *Wilkes* v. *Cornelius,* 21 Or. 348, 350, 351 (28 Pac. 135), that:

"The facts constituting the claim need not be stated with the same particularity required in a pleading in an action at law, but may be asserted in general terms; and however informal the claim may be, if it show a substantial liability in favor of the claimant and against the estate, it will be sufficient."

The claim demands the same sum as that for which this action is brought. Like this action it is based on a *quantum meruit* for services rendered and the services are specified in the claim as they are specified in the verified statement of plaintiff's account furnished the defendant on demand. The claim does not appear to be barred by the statute of limitations; on the contrary, nearly all the services rendered are alleged to have been performed within six years prior to the death of defendant's decedent. It was not necessary for plaintiff to set up in her claim the evidence on which she relied to support it. The former opinion is adhered to and the petition for a rehearing is denied. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued June 21, reversed and remanded July 10, 1917.

DUNIWAY *v.* WILEY.

(166 Pac. 45.)

Frauds, Statute of—Contract not to be Performed Within Year—Attorney's Contract to Contest Assessments.

1. An attorney's contract with property owners to contest proceedings that were being taken and might be taken in the future by a city to levy and collect assessments for a municipal improvement was not within the statute of frauds (L. O. L., § 808, subd. 1), as not to be performed within a year, since only where the contract shows by its terms, or where it is within the contemplation of the parties, that it cannot be performed within a year, does the statute apply, and in general a verbal stipulation to render a particular service which fixes no definite or contingent time for performance, but is capable of performance within a year, is not controlled by the statute.

Limitation of Actions—Statute of Limitations—Initiation of Period—Attorney's Cause of Action.

2. Where an attorney, pursuant to his contract to contest assessments for paving in the City of Portland for a contingent fee of a third saved property owners on the original amount charged against their property, brought suit and obtained decree setting aside the first assessment, which decree was entered June 28, 1907, and, under Portland Charter of 1903, Sections 400, 401, the city had the right to make a reassessment of the cost of the improvement within ten years of the passage of the resolution of intention for the making of the original work, the statute of limitations began to run against the attorney's claim for compensation against his clients April 3, 1913, when the city's time for reassessment expired, and did not begin to run on rendition of the decree.

From Multnomah: George N. Davis, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action brought in the District Court of Multnomah County by plaintiff Ralph R. Duniway, an attorney at law, on an express contract entered into during the year 1903 between him and defendants Clarissa Wiley and Andrew C. Smith. He alleges in his complaint that defendants, in conjunction with numerous property owners similarly situated, at that time employed him to contest "all proceedings that were being taken and might be taken in the future by

the City of Portland to levy and collect assessments" for a municipal improvement affecting certain property on Third Street, in Portland, Oregon; that he was to be paid for such services one third of whatever was saved on the principal of the assessment then proposed to be made, and thereafter on behalf of said property owners, he instituted suit in the Circuit Court of Multnomah County against the city, wherein, on June 28, 1907, a decree was entered canceling the assessment that had been levied against said property in the meantime and enjoining its collection. He further alleges that under its charter the City of Portland "had a right to attempt to make a reassesment at any time within ten years after instituting assessment proceedings"; that under said contract "the compensation of the plaintiff was not fully earned until ten years had expired," namely, April 2, 1913; that the owners of the property were saved $368.53, and that under the contract plaintiff was entitled to $122.84. He admits the payment of $10 on February 29, 1904, and asks judgment for the balance of $112.84.

In their answer defendants deny most of the material allegations of the complaint and set up a different special contract wherein, on behalf of the estate, they employed plaintiff to do the work performed at a stated price, namely, $20 if successful, and $10 if unsuccessful. The latter amount they paid and they plead the statute of limitations as to the other $10.

The reply traverses the new matter in the answer. Upon a trial of the issues on appeal to the Circuit Court, at the conclusion of plaintiff's evidence, a judgment of nonsuit was granted from which plaintiff appeals. REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway.*

For respondents there was a brief over the names of *Mr. Karl Herbring* and *Messrs. Malarkey, Seabrook & Dibble,* with an oral argument by *Mr. Herbring.*

MR. JUSTICE BEAN delivered the opinion of the court.

As stated, defendants admit the making of the contract for the rendition of the services of plaintiff, but allege that the compensation agreed to be paid therefor was less than the amount sued for. Without objection prior to the reception thereof, the plaintiff introduced evidence of the contract as claimed by him in the complaint, and of the successful prosecution of the suit to set aside the street assessment against the defendants' property and the failure of payment for the agreed fees, except $10. It is contended on behalf of defendants that the contract was not to be performed within a year and therefore is within the statute of frauds: Section 808, L. O. L., subdivision 1.

1. It cannot be said that the contract to contest the assessment by its terms was not to be performed within a year. From the nature of the litigation involved in that suit the time necessary for the completion thereof would depend to a large extent upon the kind of a decree obtained. If the plaintiffs had succeeded in having the collection for the improvement of that part of Third Street in question in that case perpetually enjoined as of no benefit to the property owners, that would have been a full performance of the agreement and might under favorable conditions have been carried out within a year after the engagement; therefore, the contract was not within the statute of frauds, Section 808, L. O. L., subdivision 1. It

is only where the contract shows by its terms or where it is within the contemplation of the parties that it cannot be performed within a year that the statute applies: *Bickel* v. *Wessinger,* 58 Or. 98, 104 (113 Pac. 34); *Warner* v. *Texas & Pac. Ry. Co.,* 164 U. S. 418, 434 (41 L. Ed. 495, 17 Sup. Ct. Rep. 147); note to *White* v. *Fitts,* 15 L. R. A. (N. S.) p. 321. In general, a verbal stipulation to render some particular service which fixes no definite or contingent time for its performance, but which is capable of performance within one year after the same is made, is not controlled by the statute, although the act probably will not be, and was not expected to be fulfilled within that time: 20 Cyc. pp. 199 C, and 206.

"In *McPherson* v. *Cox,* 96 U. S. 404 (24 L. Ed. 746), where, among other defenses to an attorney's compensation on a contingent fee contract, is set up the statute of frauds, the supreme court of the United States, speaking by Justice MILLER, says: 'It is said to be within the statute of frauds, because not in writing and not to be performed within a year. But the statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and do not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made. *Peter* v. *Compton,* Skin. 353, decided in King's Bench by Lord Holt, and the cases collected under that one in 1 Sm. L. C. (marg.) 432. There is nothing in the present contract to show that it was not to be performed inside of a year, nor anything to show that it could not have been performed within that time. The action of ejectment which settled the forfeiture of the lease might have been brought and tried within that time. * * "

2. It is next claimed by defendants that the statute of limitations has run against the claim. The parties made an agreement for the plaintiff, as an attorney, to prosecute proceedings to contest an assessment for certain paving in the City of Portland made under the city charter upon a contingent fee of one third of whatever was saved to the defendants on the original amount charged against the property. Pursuant to the employment the attorney brought suit and obtained a decree setting aside the first assessment, which decree was entered June 28, 1907. Under Sections 400 and 401 of the Portland charter of 1903, the city had the right to make a reassessment of the cost of the improvement within ten years from the passage of the resolution of intention for the making of the original work. The time for such reassessment would expire in this matter on April 3, 1913. The defendants' attorney in the original suit was not able to obtain a decree enjoining a reassessment. The defendants assert that the statute of limitations commenced to run at the time of the rendition of the decree June 28, 1907. In order for the counsel to earn his fee as per agreement it was his duty to obtain a final adjudication against the assessment or some part thereof or a decree that would become final so that the defendants would not be required to pay all the cost of the paving. Under the circumstances of the case in question the time for a proceeding to be taken by the city to perfect a lien upon defendants' real property did not expire until the former date (1913), and the statute did not commence to run against plaintiff's claim until that time, consequently the time for the commencement of the action, viz., six years after the cause of the action arose had not expired when this action was instituted: *Hughes* v. *Portland,* 53 Or. 370 (100

Pac. 942). As the record of the case now stands, the plaintiff is entitled to payment of the sum of $112.84, for the services admitted to have been contracted for and rendered. The judgment of the Circuit Court will therefore be reversed and the cause remanded for further appropriate proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued June 21, affirmed July 10, 1917.

ELLING v. BLAKE-McFALL CO.

(166 Pac. 57.)

Husband and Wife—Loss of Consortium—Right of Action.

1. The enabling statute has not abridged the common-law right of a husband to the companionship, love and services of his wife, comprehended in the term "consortium," and his accompanying right to sue for loss thereof through her personal injury negligently inflicted by another.

[As to right of husband to recover for loss of consortium in action for personal injuries to wife, where statute gives wife right of action for such injuries, see note in **Ann. Cas.** 1916C, 886.]

Damages—Question for Jury—Loss of Consortium.

2. Compensation for loss by husband of consortium of wife is to be determined, not by direct evidence of its value, but by the jury from their observation, knowledge and experience.

Pleading—Misjoinder of Causes—Waiver of Objection.

3. Objection to any misjoinder of claim for loss of consortium of wife with that for personal injuries to plaintiff is waived by not being taken by demurrer to complaint, pursuant to Section 68, subdivision 5, L. O. L.

Appeal and Error—Instructions—Necessity of Requests.

4. Complaint may not be made of instruction substantially giving the law; more specific or different instruction not being requested.

Master and Servant—Collision of Autos—Injury to Guest—Contributory Negligence—Duty to Remonstrate or Warn—Instruction.

5. Instruction in action by one injured by collision of defendant's auto with that of one with whom plaintiff was riding as guest that, if plaintiff had reason to suspect carelessness or incompetency of the driver, it was his duty to remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if he was running it at a dangerous rate of speed, and plaintiff knew of the rate and its danger, or in the exercise of reasonable prudence ought to have known and appreciated it, it was his duty to remonstrate against it and direct the driver to slacken it, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so, substantially states the law.

New Trial—Causes of Action Open.

6. Failure of plaintiff on the first trial to sustain or press his second cause of action does not preclude him from introducing evidence in support thereof on the second trial; a new trial being had just as though there had never been a previous one.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

This is an action by Franz H. Elling against Blake-McFall Company, a corporation, for damages sustained by plaintiff by reason of an automobile collision. From the verdict of a jury in favor of plaintiff, defendant appealed. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

The plaintiff brings this action against the defendant company for the loss of consortium of his wife, and for personal injuries sustained by himself on account of the negligence of the defendant. It is alleged in substance that at all the times mentioned in the complaint, plaintiff and Christine Louise Elling, deceased, were husband and wife; that on July 15, 1914, they were riding as guests in an automobile operated by one J. W. Fournier which was proceeding in an easterly direction on East Burnside Street in the City of Portland, Oregon; that at the same time a machine driven by one Emery, an agent and employee of the defendant, was moving in a southerly direction

on East Twenty-fourth Street; that the two automobiles collided as a result of the negligence of the defendant's employee, in which collision the plaintiff was severely injured, and his wife then and there sustained injuries from the effects of which she subsequently died; that at the time of her death, she was strong and healthy and by reason of the premises and of her untimely decease, the plaintiff has been and is deprived of the society, comfort, companionship, consortium, and services of his wife, and has been and is thereby permanently injured and damaged in the full sum of $10,000.

For a second cause of action plaintiff avers that because of the negligence of the defendant, he sustained personal injuries to his damage in the sum of $5,000, and that he expended the sum of $159 for hospital and medical bills.

The answer denies the allegations of negligence, admits that the deceased wife was killed as a result of the accident, and affirmatively sets up contributory negligence of the driver of the automobile in which the plaintiff was riding in that the machine was proceeding at an excessive rate of speed and the plaintiff, aware of it, did not caution nor remonstrate with him on this account.

The reply put in issue the affirmative allegations of the answer. Upon the second trial of the cause before the court and jury a verdict was returned in favor of plaintiff for the sum of $3,184. After the rendition of the judgment thereon defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *Mr. F. C. Howell, Messrs. Dolph, Mallory, Simon & Gearin* and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Howell.*

For respondent there was a brief over the names of *Mr. Wilfred E. Farrell, Mr. E. K. Oppenheimer, Messrs. Davis & Farrell* and *Mr. Arthur M. Dibble,* with oral arguments by *Mr. Farrell* and *Mr. Oppenheimer.*

MR. JUSTICE BEAN delivered the opinion of the court.

1, 2. It is submitted on behalf of defendant that the plaintiff husband cannot recover for the loss of consortium of his wife due to the negligence of the defendant. In its charge to the jury the trial court limited such loss, if any, to the time intervening between the injury and the death of the wife. *Marri* v. *Stamford St. R. Co.,* 84 Conn. 9 (78 Atl. 582, Ann. Cas. 1912B, 20, 33 L. R. A. (N. S.) 1042), is among the authorities supporting defendant's position. The rule enunciated there is not in harmony with the great weight of authority.

The legislation of modern times has greatly affected the status of married women by the recognition of their rights to a separate existence, thus empowering them to exercise dominion over their separate property, and to contract, and conferring upon them power to sue or be sued; but it has not in any wise abridged the common-law right of a husband to the companionship, love, and services of his wife which are comprehended in the term "consortium" and his accompanying right to sue therefor, in the event of its loss occasioned by some personal injury to her negligently inflicted by a third person: Note, 33 L. R. A. (N. S.) pp. 1042–1046; *City of Chattanooga* v. *Carter,* 132 Tenn. 609 (179 S. W. 127); *Southern R. Co.* v. *Crowder,* 135 Ala. 417 (33 South. 335); *Union Pac. Ry. Co.* v. *Jones,* 21 Colo. 340 (40 Pac. 891); *Blair* v. *Blooming-*

ton & N. R. Elec. & Heating Co., 130 Ill. App. 400; *City of Wyandotte* v. *Agan,* 37 Kan. 528 (15 Pac. 529); *Mageau* v. *Great No. Ry. Co.,* 103 Minn. 290 (115 N. W. 651, 946, 14 Ann. Cas. 551, 15 L. R. A. (N. S.) 511); *Little Rock etc. Co.* v. *Coppedge,* 116 Ark. 334 (172 S. W. 885); *Indianapolis & M. Rapid Transit Co.* v. *Reeder,* 51 Ind. App. 533 (100 N. E. 101); *Omaha & R. Valley Co.* v. *Chollette,* 41 Neb. 578 (59 N. W. 921); *Booth* v. *Manchester St. R. Co.,* 73 N. H. 529 (63 Atl. 578); *Baltimore & O. R. Co.* v. *Glenn,* 66 Ohio St. 395 (64 N. E. 438); *Reeves* v. *Lutz,* 179 Mo. App. 61 (162 S. W. 280); *Birmingham So. R. Co.* v. *Lintner,* 141 Ala. 420 (38 South. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461); *Denver Consol. Tramway Co.* v. *Riley,* 14 Colo. App. 132 (59 Pac. 476); *Denver & Rio Grande R. Co.* v. *Young,* 30 Colo. 349 (70 Pac. 688); *Georgia R. & Banking Co.* v. *Tice,* 124 Ga. 459 (52 S. E. 916, 4 Ann. Cas. 200); *Hutcheis* v. *Cedar Rapids & Marion City Ry. Co.,* 128 Iowa, 279 (103 N. W. 779); *Chicago & M. Elec. R. Co.* v. *Krempel,* 116 Ill. App. 253; *Atchison, Topeka & Santa Fe R. Co.* v. *Dickey,* 1 Kan. App. 770 (41 Pac. 1070); *Atchison, Topeka & Santa Fe R. Co.* v. *McGinnis,* 46 Kan. 109 (26 Pac. 453); *City of Eskridge* v. *Lewis,* 51 Kan. 376 (32 Pac. 1104); *Riley* v. *Lidtke,* 49 Neb. 139 (68 N. W. 356); *Mewhirter* v. *Hatten,* 42 Iowa, 288 (20 Am. Rep. 618); *London* v. *Cunningham,* 1 Misc. 408 (20 N. Y. Supp. 882, 49 N. Y. St. Rep. 447); *McKinney* v. *Western Stage Co.,* 4 Iowa, 420; *Kirkpatrick* v. *Metropolitan St. R. Co.,* 129 Mo. App. 524 (107 S. W. 1025); *Partello* v. *Missouri P. R. Co.,* 141 Mo. App. 162 (107 S. W. 473); *Reagan* v. *Harlan,* 24 Penn. Super. Ct. 27, and cases there cited; *Hewitt* v. *Pennsylvania R. Co.,* 228 Pa. 397 (77 Atl. 623); *Caswell* v. *No. Jersey St.*

R. Co., 69 N. J. Law, 226 (54 Atl. 565); *McMeekin* v. *Pittsburg Ry. Co.*, 229 Pa. 572 (79 Atl. 133).

The enabling statutes were not intended to accomplish such a result as insisted upon by the defendant. The conjugal partnership between husband and wife still exists with its bonds of love, affection, and devotion, together with the attendant privileges and filial duty of each to contribute to the care and attention of the household, the comfort and convenience of each other, and the care, nurture, and education of the children, in accordance with their mutual scriptural obligation. In all these relations and more the wife is and should be the helpmeet of the husband in conformity with their necessities and station in life without the expectation of pecuniary compensation or claim for the same. We are not in accord with the assertion that a husband is entitled to recover damages for the loss of the services of his wife only in actions for seduction, alienation of affections, and the like: See *Ainley* v. *Manhattan Ry. Co.*, 47 Hun (N. Y.), 206; 3 Blackstone, *139; 1 Cooley on Torts (3 ed.), 470. Compensation for the loss by a husband of consortium of his wife is to be determined not from direct evidence of its value, but by the jury from their observation, knowledge, and experience: *Union Pac. Ry. Co.* v. *Jones*, 21 Colo. 340 (40 Pac. 891).

3. It is argued by defendant that the claim for the loss of consortium of the wife was improperly joined with that for personal injuries to the plaintiff. If this is correct the proper procedure to challenge the complaint was by a demurrer for that reason: Section 68, L. O. L., subd. 5. If no such objection is taken by demurrer the defendant is deemed to have waived the same.

There was no error in charging the jury over the objection and exception of defendant's counsel that if they found for the plaintiff they might include in the verdict compensation to the plaintiff for the damages, if any, resulting to him from the loss of the services and companionship of his wife from the date of the accident to the time of her death. Neither was the court wrong in refusing to instruct the jury as requested in conformity with the contention of the defendant.

4, 5. Criticism is made that the court failed to instruct the jury that it was the duty of the plaintiff to remonstrate or warn the driver of the car if he was conscious that the automobile was being operated at an excessive rate of speed. The court charged the jury upon this phase of the case as follows:

"The plaintiff in this case was required to exercise reasonable care; that is, that degree of care which a person of reasonable prudence would exercise in the situation in which he was placed. If he had reason to suspect carelessness or incompetency on the part of the driver, it was his duty to protest and remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if the driver was running the car at a dangerous rate of speed, and the plaintiff knew of the rate of speed and its danger, or, in the exercise of reasonable prudence, ought to have known and appreciated it, it was his duty to remonstrate against such speed, and direct the driver to slacken the same, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so."

We find no request for any more specific or different instruction upon this point. The law was given to the jury substantially as announced in *Rogers* v. *Portland Ry. L. & P. Co.*, 66 Or. 244, 251 (134 Pac.

9); and in *Tonseth* v. *Portland Ry. L. & P. Co.*, 70 Or. 341 (141 Pac. 868).

6. Upon a motion for a new trial defendant showed by affidavit that at a former trial of this cause before another judge, the plaintiff did not press his claim for loss of services of the wife, and defendant now contends that he was precluded from introducing evidence upon this point at the second trial. There appears to have been no order of the court made at the first hearing in regard to the pleading. No showing was made upon the second trial by which the court would be informed as to the procedure at the first. Defendant speculated upon the verdict of the jury and raised a question as to the condition of the pleadings after the rendition thereof. The failure of the plaintiff to sustain the second cause of action or a waiver thereof at the first trial did not preclude him from putting in evidence in support of the same upon the second trial. The new trial is had just as though there had never been a previous one: 14 Ency. Pl. & Pr. 992; *Dows* v. *Swett*, 127 Mass. 364; *Deiermann* v. *Bemis Bros. Bag Co.*, 144 Mo. App. 474 (129 S. W. 229); *Murphy* v. *Gillum*, 79 Mo. App. 564; *Star Bottling Co.* v. *Louisiana Purchase Exposition Co.*, 240 Mo. 634 (144 S. W. 776).

From an examination of the record we find no error therein. The judgment of the Circuit Court is therefore affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued June 27, reversed July 10, 1917.

COLEMAN *v.* COLEMAN.*

(166 Pac. 47.)

Marriage—Annulment—Mental Incapacity.

1. To warrant annulment of a marriage contract for mental incapacity as provided by Section 503, L. O. L., there must have been that mental incapacity insufficient to comprehend the nature of the business and to understand its quality and consequences, as required to avoid other contracts; marriage being recognized as a civil contract by Section 7016.

[As to whether marriage to person of unsound mind is void or voidable, see note in **Ann. Cas.** 1912D, 1127. As to degree of mental incapacity sufficient to invalidate marriage, see note in **Ann. Cas.** 1913B, 1234.]

Marriage—Annulment—Sufficiency of Evidence.

2. Evidence *held* insufficient to establish mental incompetency and undue influence sufficient to avoid a marriage contract and conveyance of property incidental thereto, between inmates of a home for the aged, aged 79 and 73 years.

Contracts—"Undue Influence"—"Due Influence."

3. Solicitation, importunity, argument and persuasion are not "undue influence" sufficient to avoid a contract. Influence obtained by persuasion and argument, or by appeals to the affections is not prohibited and may be termed "due influence," and it is immaterial that the parties stand in confidential relations to each other. The line between "due" and "undue" influence when drawn must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice. Influence obtained by flattery, importunity, superiority of will, mind or character which gives dominion over the will of another to such an extent as to destroy his agency, or constrain him to do against his will what he is unable to refuse, is "undue influence."

From Lane: GEORGE F. SKIPWORTH, Judge.

Suit by John B. Coleman against Helen A. Coleman to declare void a marriage contract and to secure the cancellation of an assignment of a contract for the

*On degree of mental capacity which will affect a marriage contract, see notes in 40 **L. R. A.** 737; 38 **L. R. A. (N. S.)** 818.

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sale and purchase of real property made with a third party. The lower court found in favor of plaintiff and defendant appealed. Reversed and suit dismissed.

Department 1. Statement by MR. JUSTICE BURNETT.

This suit is not for the dissolution of a marriage contract, but for the purpose of having it declared void and incidentally to secure the cancellation of an assignment to the defendant of an agreement made by the plaintiff with a third person for the sale of real property upon which there was due about $1,000 of the purchase price.

The parties were married at San Diego, California, August 26, 1912. The plaintiff was then seventy-nine and the defendant seventy-three years of age. They were both inmates of the Fredericka Home for the Aged near that city. It is not a charitable institution, but those who seek admission must pay at least $500 entrance fee and a stipulated sum monthly for their keep. They were married after an acquaintance of about six months. The plaintiff was a man possessed of considerable property. He had an income varying from $600 to $900 a month derived from property which he had conveyed, charging it with certain stipulated installments to be paid to him during his life. Besides this he had holdings of real property and contracts for the sale of realty from which he derived regular payments. Some of his estate was situated in Eugene, Oregon, and other parts of it in San Diego, California. The complaint thus describes the plaintiff's capacity to make a contract:

"The plaintiff further alleges that by reason of the advanced years and physical infirmities of this plaintiff his mental faculties had become weakened and impaired to such an extent that during said time he was

an inmate at said Home of the Fredericka Home for the Aged, and at the time of the contracting of the marriage hereinafter set out he was incapable of understanding and incapable of grasping the full meaning and comprehending and realizing the result or consequence of contracting a marriage and that by reason of his advanced years and impaired mental faculties, his capacity to resist influence and importunities by persons who had acquired his confidence especially, had become weakened and impaired to such an extent that he could be easily influenced and readily imposed upon and his property taken from him without consideration by persons who might pretend to be his friends or in whom he had confidence."

In this language the plaintiff narrates the conduct of the defendant in procuring the marriage:

"That shortly after he entered the home of the Fredericka Home for the Aged in February, 1912, the defendant, who was then Helen A. Orthwaite, also was a member of said Fredericka Home for the Aged as aforesaid and fully understanding and knowing the weakened and impaired mental condition of this plaintiff and by reason thereof his incapacity to transact business and enter into any contract, for the purpose and with the intention of procuring money and property from this plaintiff by devices, schemes and pretensions of friendship and attention to the welfare of the plaintiff, wormed herself into his confidence and acquired great and overpowering influence over him so that this plaintiff became completely under her control and dominion.

"The plaintiff further alleges that while both he and the defendant were so members of the said Fredericka Home for the Aged, the defendant who is a strong-minded person having acquired such influence over this plaintiff, persuaded and induced him to enter into the marriage relation with her and that he and the defendant were on August 26, 1912, married at San Diego, in the State of California. That said marriage was induced by the defendant's promises of care, atten-

tion and kindness towards the plaintiff and of her great interest in the said plaintiff and his welfare, and by her schemes, influence, persuasion and promises, fully knowing the weakened mental condition of the plaintiff induced him to enter into said marriage contract. * *

"The plaintiff further alleges that at the time of the said marriage and of the assignment of the said land sale contract hereinbefore set forth he did not grasp the situation of the same. That they were procured by said undue and overpowering influence, by false promises and in the execution of the schemes of the defendant to become possessed of all of the property of the plaintiff."

His initiatory pleading contains averments about the transfer of certain pieces of property the recovery of which is not sought in this proceeding and alleges in addition thereto the assignment by him to the defendant of a contract made by him with one Melvin Hansen whereby the latter agreed to pay the former $3,500 in installments as the purchase price of city property in Eugene. The cancellation of this assignment is the only property relief sought in this suit.

Aside from admitting the age of the plaintiff and his being an inmate of the Fredericka Home at the same time the defendant was there, the answer denies the whole complaint except as otherwise alleged. The defendant avers that all the transfers of property to her were made after the marriage voluntarily, freely, and understandingly on the part of the plaintiff. She states in respect to the marriage that it was consummated only at the earnest solicitation of the plaintiff himself and that he fully comprehended the nature, effect, and consequences of the relation thus assumed. Her prayer is merely for the dismissal of the suit.

The reply traverses the answer except as stated in the complaint. The Circuit Court rendered a decree

according to the prayer of the plaintiff and the defendant appeals. Pending the appeal the plaintiff died and at the hearing it was stipulated in open court that his personal representatives should be substituted in his stead. REVERSED. SUIT DISMISSED.

For appellant there was a brief over the names of *Messrs. Thompson & Hardy* and *Mr. Lark Bilyeu,* with oral arguments by *Mr. Bilyeu* and *Mr. Charles A. Hardy.*

For respondent there was a brief over the names of *Messrs. Foster & Hamilton* and *Mr. W. G. Martin,* with oral arguments by *Mr. Martin* and *Mr. O. H. Foster.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. We find in Section 503, L. O. L., that:

"When either of the parties to a marriage shall be incapable of making such contract or assenting thereto, for want of legal age or sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage shall be void from the time it is so declared by the decree of a court having jurisdiction thereof."

In this state marriage is recognized as a civil contract: Section 7016, L. O. L. Like any other compact a marriage is valid as against him if at the time of its solemnization the party afterwards seeking to have it declared void had mental capacity sufficient to comprehend the nature of the business in which he was engaged and to understand its quality and consequences: *Carnagie* v. *Diven*, 31 Or. 366 (49 Pac. 891); *Swank* v. *Swank,* 37 Or. 439 (61 Pac. 846); *Dean* v. *Dean,* 42 Or. 290 (70 Pac. 1039); *Hamilton* v. *Holmes,*

48 Or. 453 (87 Pac. 154); *Pickett's Will,* 49 Or. 127 (89 Pac. 377); *Reeder* v. *Reeder,* 50 Or. 204 (91 Pac. 1075); *Ames* v. *Moore,* 54 Or. 274 (101 Pac. 769); *Mansfield* v. *Hill,* 56 Or. 400 (107 Pac. 471, 108 Pac. 1007); *Stevens* v. *Myers,* 62 Or. 372, 382 (121 Pac. 434, 126 Pac. 29); *Bohler* v. *Hicks,* 120 Ga. 800 (48 S. E. 306); *Schmidt* v. *Schmidt,* 201 Ill. 191 (66 N. E. 371); *Bauchens* v. *Davis,* 229 Ill. 557 (82 N. E. 365); *Drumm* v. *Capps,* 240 Ill. 524 (88 N. E. 1020); *Conner* v. *Skaggs,* 213 Mo. 334 (111 S. W. 1132); *In re Will of James D. White,* 121 N. Y. 406 (24 N. E. 935); *In re Brush's Will,* 35 Misc. Rep. 689 (72 N. Y. Supp. 421); *Buchanan* v. *Belsey,* 65 App. Div. 58 (72 N. Y. Supp. 601); *McGovran's Estate,* 185 Pa. 203 (39 Atl. 816); *Hemingway's Estate,* 195 Pa. 291 (45 Atl. 726, 78 Am. St. Rep. 815); *Kendrick's Estate,* 130 Cal. 360 (62 Pac. 605); *In re Riordan's Estate,* 13 Cal. App. 313 (109 Pac. 629); *Hartung* v. *Holmes,* 159 Cal. 161 (113 Pac. 130); *Stull* v. *Stull,* 1 Neb. Unof. 389 (96 N. W. 196); *Taylor* v. *McClintock,* 87 Ark. 243 (112 S. W. 405); *Deckenbach* v. *Deckenbach,* 65 Or. 160 (130 Pac. 729); *Wade* v. *Northup,* 70 Or. 569 (140 Pac. 451); *Magness* v. *Ditmars,* 81 Or. 598 (160 Pac. 527); *Sims* v. *Sims,* 121 N. C. 297 (28 S. E. 407, 61 Am. St. Rep. 665, 40 L. R. A. 737); *Dunphy* v. *Dunphy,* 161 Cal. 380 (119 Pac. 512, Ann. Cas. 1913B, 1230, 38 L. R. A. (N. S.) 818).

2. It appears from the testimony that the plaintiff had become involved in meretricious relations with a woman in San Diego named Kate E. Bacon, who had obtained from him a considerable amount of property. He had brought suit in the California courts to recover what she had obtained from him and had gone to become an inmate of the Fredericka Home. The suit with Mrs. Bacon was finally compromised by her re-

turning to him most, if not all, the property. He became acquainted with the present defendant by reason of being thrown in her company at the table at the Home and because she made a practice of reading to the inmates of the institution, himself included, and conducted religious services there. He told her about his troubles with the Bacon woman and she aided him in looking up testimony and preparing for trial. He states that it was she who proposed the marriage and thus relates it:

"We had been acquainted quite a little bit. One day I was passing around as usual, and we were talking and she says, 'Now, Mr. Coleman, you recollect the first time you promised to marry me.' Well, I didn't have sense enough and stamina enough to tell her, 'Now, you sneak off. I never told you I would marry you in my life.' I think that's what took place. That is about the first of it."

He goes on to testify that it was some months afterwards when they were married; that her reading, praying, and talking to him, and paying attention to him had a good effect upon him and that it was not long before she had his confidence and "I couldn't hardly resent anything that she asked for or talked about."

He also declared under oath as follows:

"Q. Did you want to get married?

"A. I reckon I did at the time or I wouldn't have married her.

"Q. You married her because you enjoyed her companionship?

"A. Yes sir.

"Q. And liked to have her read to you?

"A. Yes sir.

"Q. After you were married, you built two rooms for yourself and your wife?

"A. I built the rooms before we were married, quite a while. * *

"Q. You knew you were married, didn't you?
"A. Yes sir. * *
"Q. Didn't get interested in anybody else?
"A. No sir.
"Q. You wanted to provide for your wife, didn't you?
"A. Well, I did, to a certain extent.
"Q. You did that of your own free will?
"A. Yes, nobody hired me to. * *
"Q. What are you bringing this lawsuit for? What is your idea?
"A. To get a divorce.
"Q. Why do you want a divorce?
"A. I don't want to be husband to a wife, that we don't live together. I guess I might say I don't like her and she don't like me.
"Q. It was suggested that you give all your property to your wife; you have an income now?
"A. Yes, I have an income.
"Q. How much is your income?
"A. Why, I don't just exactly remember how many dollars a month, it is.
"Q. Well, about how much?
"A. Well, about in the neighborhood of six hundred dollars a month.
"Q. You have had six hundred dollars a month all the time, haven't you?
"A. Yes, sir.
"Q. So you didn't give her everything?
"A. No sir, I did not give her my income.
"Q. And that six hundred dollars a month is an income to come to you as long as you live?
"A. Yes sir. * *
"Q. You have no close relations?
"A. Why, yes. * *
"Q. You have no children?
"A. No sir.
"Q. No brothers?
"A. No sir.
"Q. No sisters?
"A. No sir.

"Q. Your nearest relation is a nephew?
"A. Yes sir.
"Q. You have given him some property that he is to get after your death?
"A. Yes sir.
"Q. You know all about that?
"A. Yes sir.
"Q. There is nobody as near you as your wife?
"A. My nephew.
"Q. You wouldn't call your nephew as close to you as your wife, would you? You feel a man ought to provide for his wife?
"A. Yes sir.
"Q. And that is what you were doing?
"A. Yes sir.
"Q. You felt that you were doing the right thing in providing for your wife?
"A. Yes sir.
"Q. You were satisfied with that transaction until you decided to leave her. Isn't that a fact?
"A. Yes sir. I decided to sue her for a divorce and I employed Foster, and it has been on hands twelve months, and I aint got no divorce yet.
"Q. You have got tired of waiting and dissatisfied with the length of time?
"A. It seems that I ought to have it in less than twelve months.
"Q. Did you explain to Senator Wright what you wanted to do when you made the papers out?
"A. I guess I told him enough so that he did it.
"Q. You dictated it to him?
"A. I told him what I wanted him to do.
"Q. It was not until after you decided that you wanted a divorce that you wanted the property back, was it?
"A. Yes, I wanted the property back. * *
"Q. You would be satisfied to provide for your wife?
"A. Yes, I had done that before I decided to leave.
"Q. The reason you wanted your property back was because you decided to leave?

"A. No sir, I didn't want her to have my property unless she was my wife."

His physician who had known him for thirty years was asked this question: "He is up to the average for his age in mental ability taking into consideration his intellectual attainments?" to which he replied, "He is fairly average. So far as that is concerned a man of his age always declines mentally." Other witnesses for the plaintiff were business men who claim that he was not so bright as formerly but still they transacted business with him regularly even up to the time of the hearing.

The defendant stoutly denies having proposed marriage to the plaintiff but contends earnestly that he was persistent in his attentions to her which finally resulted in her consent to become his wife. In this she is corroborated by others residing at the institution. They lived together as man and wife for more than one year. The unchallenged testimony of those who testified for the defendant is to the effect that she was very tender and dutiful to him as a wife. On the other hand he was irascible, irritable, and quarrelsome with other inmates of the Home. The superintendent of the institution, a Mrs. Saylor, testified that she caught him in the act of striking the defendant with his cane and shamed him into an apology for that. After his frequent outbursts of anger he would be very agreeable until the next time he lost his temper, and it was during these benignant moods that he would make his gifts to the defendant.

About the transaction involving the latest disposition of his property, the testimony is to the effect that he had a spell of acute indigestion from over-eating which affected his heart functionally in consequence of which his wife told him that if he had another such

an attack he might die and that if he had any business to arrange he had better attend to it. She says he then told her to come with him and they went to San Diego where they consulted his physician who said there was no organic trouble with his heart. He immediately took her to the law office of Senator Wright and there dictated to him the transfer of the property mentioned, including the contract now in dispute. She says it was wholly without solicitation on her part, was his own voluntary doing, and that she had no intimation of his purpose until he stated it to the attorney. On another occasion he called two old ladies, inmates of the Home, to witness a document which he executed making provision for his wife. He gives as a reason for leaving the Home and returning to Eugene where he had formerly lived, the fact that he had had difficulties with other old men there and that one of them had turned the hose on him. This altercation is described by other witnesses who say that the plaintiff was wholly at fault in that matter.

When asked what kind of persuasion the defendant used to get him to marry her, the plaintiff answered:

"She was kind and good to me, you might say.

"Q. Anything else?

"A. Why, no.

"Q. You married her because you thought she was kind and good?

"A. Yes sir.

"Q. And that is the only persuasion that she used?

"A. She talked kind to me and respectful until—

"Q. What persuasion did she use to get you to assign to her the Shelton mortgage?

"A. I don't recollect.

"Q. Did she use any persuasion to get you to turn over property?

"A. I don't recollect.

"Q. Did she use any persuasion when you were in Senator Wright's office to get you to turn over the Biddle property?

"A. No. She talked to me about turning the property over before we started up to Wright's office.

"Q. What persuasion did she use to get you to do that?

"A. I don't know as you would call it persuasion. She said if I had another heart trouble, that I would die. That I better turn over the property to her, and I did so.

"Q. You were satisfied with this transaction until you decided to leave her?

"A. Well, I did it.

"Q. You were satisfied with it until you decided to leave her, weren't you? If you had stayed with her, you wouldn't care about that?

"A. I decided that I didn't want to give her a piece of property, in one piece twelve thousand dollars, and in another piece in the neighborhood of a thousand or over.

"Q. You changed your mind about it?

"A. I changed by mind that I didn't want to do that."

These excerpts from the plaintiff's own statements as a witness show that he well understood what he was about in all the transactions involved and that the defendant did not in any manner coerce or deceive him.

A careful reading of the whole record of the evidence reveals a clear preponderance showing that the marriage was sought by the plaintiff knowingly and understandingly. He was fully aware of the agreement into which he entered and the nature of it. He ratified it by more than a year's cohabitation with the defendant. He was the dominating character in the matrimonial venture. His business transactions during the time he lived in California show that he was

a man apparently able to take care of himself. It is true that in his liaison with the Bacon woman she had obtained an advantage over him from which he recovered as a result of his litigation against her. Even if we should consider the very vague and general averments of the complaint as sufficient to charge fraud or undue influence, there is not a line of testimony showing that the defendant took any undue advantage of the plaintiff or was guilty of any stratagem or fraud which would justify the annulment of the marriage or of the return of the land contract now in dispute. The sum and substance of the situation is that his reviving cupidity overcame his waning concupiscence. So it repented him somewhat that he had married the defendant, but more that he had been generous with her and he longed for the return of his hoard. It is abundantly proved that she was a dutiful wife. Indeed, he does not attack her on the ground that she was guilty of anything which would lead to a dissolution of a valid marriage but would overturn it on the ground that he was incapable of understanding the matrimonial contract into which he entered. The record discloses no situation of the kind. So far as the property was concerned it was his own. He had no relative nearer than the nephew for whom he had abundantly provided and nothing is more natural than that he should provide for his wife. If he chose to sow his wild oats in the December of his life he had no one to blame for it but himself.

3. On the matter of undue influence a text-writer lays down the rule thus:

"Solicitation, importunity, argument, and persuasion are not undue influence, and a contract is not to be set aside merely because the one party has used these means to obtain the consent of the other. Influence

obtained by persuasion and argument or by appeals to the affections is not prohibited either in law or morals and is not obnoxious even in courts of equity, and may be termed 'due influence.' Nor is the case changed because the parties stand in confidential relations to each other. The line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice. But on the other hand influence attained by flattery, importunity, superiority of will, mind, or character, which gives dominion over the will of another to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse, is such influence as equity condemns as undue'': 9 Cyc. 455.

The death of the plaintiff has ended the marriage relation and there is nothing in the record justifying the court in canceling the assignment of the contract mentioned. The decree of the Circuit Court is reversed and one here entered dismissing the suit.

REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

Motion to enjoin execution denied September 28, 1915.
Argued on the merits May 22, affirmed June 19, rehearing denied July 17, 1917.

ROGUE RIVER FRUIT & PRODUCE ASSN. *v.* GILLEN-CHAMBERS CO.

(151 Pac. 728; 165 Pac. 679.)

ON MOTION FOR INJUNCTION.

Appeal and Error—Stay of Proceedings—Counter Undertaking—"Suit on a Contract."

1. An action for damages for breach of a contract is a suit on a contract, within Section 553, L. O. L., providing for the enforcement of judgments in such suits, notwithstanding an appeal and an undertaking for stay of proceedings upon the giving of a counter undertaking.

ON THE MERITS.

Contracts—Construction—Arbitration.

2. A construction contract reserving to the owner's engineer the right to inspect the building does not make him the arbiter of compliance with specifications so as to render his acceptance or failure to object binding upon the owner.

[As to conclusiveness of architect's or engineer's certificate, see note in 56 **Am. St. Rep.** 314.]

Contracts—Breach—Waiver.

3. To constitute acceptance of a building or approval of the work and material a waiver or estoppel, it must appear that the owner knew of the defects which he afterward complained of, since waiver cannot be imputed in the absence of knowledge.

Contracts—Breach—Waiver—Instructions.

4. In building owner's action against the contractor for damages for defective work, a requested instruction that approval of the building bound the plaintiff after his examination was properly refused as omitting plaintiff's knowledge of the defects, since mere examination does not always impute knowledge especially of latent defects.

Appeal and Error—Scope of Review—Requests for Instructions.

5. In the absence of request for a proper instruction upon a proposition at issue, it will not be considered on appeal.

Contracts—Breach—Estoppel.

6. Mere inspection of work by the building owner or its agents does not so conclusively estop it as to prevent its recovering damages for hidden defects of construction or amount to a waiver of faults discovered after the completion of the work.

ON PETITION FOR REHEARING.

Trial—Instructions—Questions of Law and of Fact.

7. The requested instruction desired by defendant was properly refused on account of the matter set forth being a question of fact for the jury to pass upon, and where the petition fails to distinguish between questions of fact and questions of law, a rehearing will be denied.

From Jackson: FRANK M. CALKINS, Judge.

In Banc. Statement by MR. JUSTICE EAKIN.

This is an action by the Rogue River Fruit & Produce Association against the Gillen-Chambers Company upon a contract for the erection of a building.

The plaintiff alleged that by reason of the failure of the defendant to keep the terms of the contract it had been damaged in the sum of $2,000. On a trial it recovered judgment for $1,509.52. Defendant appealed, and gave a stay bond, as is provided by Section 551, subdivision 4, L. O. L. Within the time prescribed the plaintiff filed a counter-bond, as required by Section 553, L. O. L., and issued an execution to enforce the judgment notwithstanding the appeal. The defendant now moves this court for an order to enjoin any sale under this execution pending the appeal, upon the ground that this action is not within the purview of said Section 553. MOTION DENIED.

Messrs. Neff & Mealey, for the motion.

Mr. O. C. Boggs and *Messrs. Beach, Simon & Nelson, contra.*

MR. JUSTICE EAKIN delivered the opinion of the court.

1. The power of this court to issue an injunction in such a case, when the action is within the purview of Section 553, L. O. L., is upheld by this court in *Kollock & Co.* v. *Leyde,* 77 Or. 569 (143 Pac. 621); so

the only question to be considered is as to whether this is an action upon a contract. This it clearly is.

Counsel for defendant contends that the section refers only to a contract for the direct payment of money—for example, a promissory note, when the promisee admits liability for a specific amount—and that it was not intended to cover an action for damages, although the right to recover such damages arises upon a contract. No authority is cited for such construction, and we doubt if any exists. There is an abundance of decisions holding that such an action as the one at bar is an action upon a contract: See 1 Words and Phrases, p. 145.

The injunction is denied. DENIED.

Affirmed June 19, 1917.

ON THE MERITS.

(165 Pac. 679.)

Department 1. Statement by MR. JUSTICE BURNETT.

This is an action to recover damages for the faulty installation by the defendant of insulating material in the plaintiff's cold-storage warehouse at Medford, Oregon. It is admitted that the defendant signed specifications for the work including certain requirements for furnishing and putting in place on the walls and ceilings cork board in two thicknesses and containing also the following:

"GUARANTEE:

"Contractor will guarantee that the transmission of British Thermal Units per square foot per degree Fahrenheit difference in temperature for twenty-four hours, in the insulation herein specified shall not exceed four British Thermal Units, and that same will

not exceed that of any other insulation including Union Fiber Company's Lithboard.

"All material and workmanship in connection with the installation of the insulation as above specified shall be guaranteed first class in every respect, and be subject to the inspection of the Rogue River Fruit & Produce Association's representative and the Supervising Engineer, at any and all times during the construction or installation of the work."

It is stated by the plaintiff that the defendant entered upon the work described and afterwards represented to the plaintiff that it had fully completed the same on its part in accordance with the contract. It is conceded by the defendant that it represented to the plaintiff that it had performed the contract as modified by the latter. The complaint avers:

"That it was impossible from an inspection of said work so completed to detect that the same had not been properly done in accordance with said contract and specifications and that thereupon plaintiff, not knowing the contrary thereof, and without any neglect on its part, assumed that said contract had been fully and properly performed by said defendant * * and paid to said defendant said sum of $7,200.00 in full performance of said contract on its part and entered into the possession and use of said warehouse as so insulated by defendant."

The specifications required that on the walls the insulation of cork board should be double in thickness

"set in cement plaster or hot asphaltum or pitch, breaking joints with second layer and after cork has been set in place plaster same with two coats of best cement plaster floated to a smooth surface."

The ceiling was to be insulated by placing two layers of cork board on the ceiling, nailing the first to the joists, dipping the edges in hot asphaltum or wiping the same with cement plaster as applied. The

second layer was to be dipped in hot asphaltum or set in cement plaster using wooden skewers driven in at an angle sufficient to hold the board in place until the plaster or pitch had set. The complaint charges that the defendant failed to secure the first layer to the wall in any manner; that it also did not fasten the second layer on the walls and ceiling in any way, or break the joints, and in several other respects did not perform its agreement, with the result that the insulation was faulty and defective and that in many cases the cork material fell away from the ceilings and side walls and cracked so as to make it poor and insufficient for the purpose designed by the contract; and, lastly, that the transmission of heat through the insulation in British Thermal Units per square foot per degree of temperature for twenty-four hours greatly exceeded the ratio prescribed by the contract. The plaintiff alleges damages amounting to $2,000 on account of the alleged shortcomings of the defendant.

The answer admits the payment to the defendant of the contract price of $7,200, except that the plaintiff retained $1,700 thereof until three months subsequent to the completion of the project when, as defendant alleges, the balance was paid after a full and careful examination of the job by plaintiff's engineer, final acceptance of its work by the plaintiff, and determination by inspection and test that the transmission of heat would not exceed the limit specified in the stipulation. The imputations of defective and unworkmanlike manner of performing the contract are denied by the answer. It is charged by that pleading also that the construction of the building and the putting in of the insulation was at all times under the direction and control of the plaintiff's engineer; that the work was done in accordance with the agreement "except where

variances were necessitated by change of plans of the plaintiff and its engineer with reference to the construction of the building." It is further stated by the defendant "that the method of setting cork board to the walls which was deemed by the defendant most advisable was not permitted by the plaintiff, and defendant was required by the plaintiff to set the cork board to the walls with hot pitch and nails instead of cement plaster"; and generally the answer alleges that the work was done according to contract at all times under the supervision of the plaintiff and its engineers and employees. The defendant also avers a counterclaim against the plaintiff for material sold and delivered to it which is admitted by the reply. Otherwise that pleading traverses the allegations of the answer. The jury returned a verdict for the plaintiff and from the ensuing judgment the defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Beach, Simon & Nelson* and *Mr. O. C. Boggs,* with an oral argument by *Mr. Boggs.*

For respondent there was a brief over the name of *Messrs. Neff & Mealey,* with an oral argument by *Mr. Porter J. Neff.*

MR. JUSTICE BURNETT delivered the opinion of the court.

2. The first point urged in the brief of the defendant is that

"where construction work is made subject to the inspection of an architect, or engineer, representing the owner, and the architect approves the work and material, issues his certificate thereon, and the same is

accepted by the owner, the acceptance is binding, in the absence of fraud pleaded and proved."

The precedents cited to support this contention are where the architect is made the arbiter between the parties as to the fitness of material and manner of doing the required work and his decision is made final on those subjects. The result of such a stipulation is to create a tribunal for the occasion whose determinations are agreed to be conclusive. In this instance, according to the quoted specifications, no such authority is vested in the architect or other person who has charge of the work on behalf of the plaintiff. It is said that the work shall be subject to the inspection of the plaintiff's representative which means only that he shall have an opportunity to see the work while it is being performed. It is nothing more than what would be understood in the absence of any express statement on the subject. It is a general rule that a party hiring work done or materials furnished has a right to inspect the same before paying the purchase price to see if they comply with the contract. That is all that can be derived from the stipulation concerning inspection in the present instance.

What then is the effect of the acceptance of the work? It must be remembered that the plaintiff was the owner of the building. It was attached to the realty. The materials furnished by the defendant were incorporated as part of the structure. We note, also, the allegation of the complaint to the effect that it was impossible from an inspection of the completed work to detect that it had not been installed properly. Speaking on this topic in *Steltz* v. *Armory Co.*, 15 Idaho, 551 (99 Pac. 98, 20 L. R. A. (N. S.) 872), Mr. Chief Justice AILSHIE says:

"On the other hand, the mere fact of entering into possession with knowledge of this defect is not sufficient to defeat the owner's right of action for breach of the contract as to the quality of material used, of the class and character of workmanship put on the building, unless an express waiver is shown, or such other facts as would amount to a waiver. The owner always has the general possession of the property, and the contractor's possession is only a special and limited possession for the purpose of doing the work for which he has contracted. It often becomes necessary and essential for the owner to take possession of a building or structure, although not completed or imperfectly and defectively constructed, in order to protect himself from still further and greater damages. The fact of such possession should not be a bar to his right of recovery for breach of the contract (citing authorities). Knowledge in a general way of a latent defect of which the owner had no means of knowing its extent and latent dangers will not amount to a waiver of the right of action for a breach of the contract, in the absence of other facts tending to disclose an intent to waive the right of action."

3. In order that the acceptance of the building or the approval of the work and material shall amount to a waiver or an estoppel it must appear that the one to be estopped or affected by the waiver knew of the defects of which he afterwards complained, because no waiver can be imputed to one who does not know what he is said to have waived. Of course his knowledge may be proved by direct testimony or by circumstantial evidence. But in the absence of a stipulation making the decision of the architect final with authority, we cannot say as a matter of law that the acceptance of the work is conclusively binding upon the owner beyond all right to recover for defects subsequently discovered. We can readily understand how the cork board might be attached to the walls by means

of a slight application of pitch or asphaltum so as to remain temporarily in place and present an outward appearance of a substantial job and afterwards become detached from the ceiling and walls and be practically worthless. To bar the plaintiff from recovering damages under such circumstances would not accord with fair dealing there being no showing that it knew the manner in which it was being installed and directly approved the same. Whether the plaintiff knew and with that knowledge adopted the manner of doing the work was a question of fact for the jury which has been decided against the defendant.

The principal error assigned by the defendant is predicated upon the refusal of the following instruction:

"The court instructs the jury as a matter of law that where part of a building being constructed under contract has passed under the inspection of the owner and the architect or his superintendent, and was approved by them in good faith, expressly or by implication, by failure to promptly object thereto, that part which has been so approved is not open to objection by them afterwards, this applies to the entire building if it has been so approved or to the work of a subcontractor so approved. The owners and the architects or his superintendent's objection should have been promptly exercised."

4. This charge is not by the mark in that it omits the element of knowledge on the part of the plaintiff of the particular defect in the installation of the materials. It is true it mentions the inspection of the owner and his representatives; but mere examination does not always impute knowledge, especially of latent defects.

The only remaining contention presented in the brief for the defendant is this:

"A guaranty provision incorporated in a building contract, the terms of which contract require the compliance by a builder with detailed specifications provided by the owner, may be availed of only in the event of default on the part of the builder in observing the requirement of the specifications. Such a guaranty will not be construed as a warranty that the specifications to which the builder is required to conform and from which he cannot deviate, will produce any certain result."

5, 6. Conceding this to be a correct statement of the law, yet there was no request thus to instruct the jury so far as the bill of exceptions discloses. We remember also that the action is predicated upon the allegation of careless and unworkmanlike performance of the contract on the part of the defendant and the charge of the complaint is that the resulting damage flowed from the shortcomings of the defendant and unnecessarily from a breach of its guaranty. It may be conceded that where there is no express guaranty of results, a contractor will escape being mulcted in damages if he faithfully complies with the specifications of his contract as to the workmanship and materials. It is also equally true that it is competent for a contractor to adopt plans and specifications submitted in an offer to him and thereupon to guarantee that the desired result will follow the installation of work thus outlined. For want, however, of apt requests to instruct the jury on this subject and considering that the issue was joined on alleged failures of the defendant to perform its contract in manner and form as stipulated, the question about the effect of the guarantee in this instance properly may be dismissed without further consideration. In brief, the mere inspection of work by the plaintiff or its agents does not so conclusively estop it as to prevent it from recovering damages for hidden

defects of construction or amount to a waiver of faults discovered after the completion of the work as the complaint charges. As against the contentions urged in the defendant's brief we conclude that the case was fairly submitted to the jury and that the verdict and ensuing judgment are conclusive upon us. The decision of the Circuit Court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Denied July 17, 1917.

PETITION FOR REHEARING.

(165 Pac. 1183.)

On petition for rehearing. Rehearing denied.

Mr. O. C. Boggs and *Messrs. Beach, Simon & Nelson,* for the petition.

Messrs. Neff & Mealey, contra.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

In a petition for rehearing counsel for defendant press upon our attention the following extract from *Pippy* v. *Winslow,* 62 Or. 219, 223 (125 Pac. 298):

"Under the circumstances of this case, that part of the building which passed under the inspection of Mr. Winslow, the owner, and Mr. Tobey, the architect, and was approved by them in good faith, expressly or by implication, was not open to objection by them afterwards, and plaintiffs may recover therefor"—citing authorities.

That was a suit to foreclose a mechanic's lien. On the hearing in this court we were called upon to decide

questions of fact as well as of law. We considered, as stated, "the circumstances of the case," and in the excerpt quoted determined an issue of fact and not a question of law. The instruction desired by the defendant in the instant case and the refusal of which was assigned as error demanded that the court charge the jury as a legal conclusion that the inspection of the building foreclosed the plaintiffs from ever thereafter objecting to the work thus approved. The cases relied upon to support this doctrine were where the architect was made the final arbiter as to the excellence of the work and compliance with the contract. The stipulation gave him jurisdiction to hear and determine disputes of that character and made his adjudication final. There is no such situation in the case at hand. However much we may believe that a man experienced as the superintendent of the plaintiff may have been, actually knew the quality of the work done by the defendant, yet that was a question of fact for the jury and we cannot say as a matter of law that he did know or that the plaintiff is bound by his knowledge. The petition fails to distinguish issues of fact and questions of law, and, hence, must be denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Argued July 3, affirmed July 17, 1917.

HOUSTON *v.* KEATS AUTO CO.*

(166 Pac. 531.)

Master and Servant—Third Person's Injury—Automobile Accident—Presumption.

1. Where plaintiff proves that the vehicle which caused his injury belonged to defendant, the jury may infer that the driver was defendant's servant, and that the vehicle was being used for defendant's purposes.

Master and Servant—Third Person's Injury—Automobile Accident—Relation—Question for Jury.

2. Evidence showing ownership and use of automobile causing plaintiff's injury *held* sufficient to submit to the jury the question of the driver's employment by defendant and use of car for defendant's purposes.

Master and Servant—Third Person's Injury—Automobile Accident—Instructions.

3. Instructions that, if driver of automobile which injured plaintiff was in defendant's employ, and was then using the car in defendant's business, plaintiff could recover, *held* warranted by the testimony.

Master and Servant—Third Person's Injury—Automobile Accident—Relation—"Servant."

4. If defendants selected the driver of automobile injuring plaintiff, had power to discharge him, and right to direct his work, the driver was then the defendant's "servant."

Master and Servant—Third Person's Injury—Automobile Accident—Master's Liability.

5. If the driver of the automobile injuring plaintiff was defendant's servant, and was using the machine in defendant's business for the purpose of demonstrating the automobile for a prospective purchaser, the defendants were responsible for the driver's acts.

Master and Servant—Principal and Agent—What Constitutes Relation—Wages.

6. The receipt of a stated wage is not essential to create the relation of principal and agent or master and servant.

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*As to who is responsible for negligence of chauffeur driving a leased or demonstration car, see notes in 40 **L. R. A. (N. S.)** 457; 44 **L. R. A. (N. S.)** 113; 51 **L. R. A. (N. S.)** 1164.

As to making *prima facie* case of responsibility for negligence of driver of automobile by proof of defendant's ownership of car, or employment of driver, see note in 46 **L. R. A. (N. S.)** 1091.

REPORTER.

Master and Servant—Third Person's Injury—Independent Contractor.

7. Defendants would not be liable for plaintiff's injury from an automobile owned by them if the driver was an independent contractor, defendants retaining no control over him, and the work not being inherently dangerous.

[As to liability of owner of automobile for act of driver other than his child or servant, see note in **Ann. Cas.** 1916A, 668.]

Master and Servant—Third Person's Injury—Effect of Contract on Liability.

8. Contractual relations between owners of automobile injuring plaintiff and the driver thereof could not relieve defendants from liability if the driver was in fact under their control and engaged in the transaction of their business.

Trial—Refusal of Request Excluding Evidence.

9. In action for injuries resulting from automobile accident, it was proper to refuse a requested instruction which would have taken from the jury certain evidence that at the time of the accident the driver was endeavoring to sell defendant's car to defendant's customer.

Trial—Refusal of Request Covered by Charge.

10. In action for injuries resulting from an automobile accident, requested instruction was properly refused where it was substantially covered by given instructions.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action for personal injuries, brought by Mary M. Houston against H. L. Keats and W. N. Jones, partners as H. L. Keats Auto Company. It appears from the evidence that on August 1, 1915, plaintiff got off a south-bound car at the intersection of Union Avenue and Broadway in the city of Portland, intending to transfer to a Broadway car. About the time that she reached the curb one of the defendants' automobiles ran her down, pushing her violently against a telegraph pole. It is conceded that the driver of the car was intoxicated, that he was driving at an excessive speed and that he violated a city ordinance in passing by the side of a car from which

passengers were alighting. The evidence clearly proves the injuries sustained by plaintiff.

The defendants contend that A. J. Chance, the driver of the auto, was not their servant, but an independent contractor for whose negligence they are not responsible. The jury found for plaintiff on this issue and a judgment in her favor in the sum of $3,000 was entered on the verdict. Defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett* and *Messrs. Crawford & Eakin,* with oral arguments by *Mr. S. C. Spencer* and *Mr. T. H. Crawford.*

For respondent there was a brief over the name of *Messrs. Logan & Smith,* with an oral argument by *Mr. I. N. Smith.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

The assignments of error most insisted upon are based on the denial of defendants' motions for a nonsuit and for a directed verdict. It is contended that there is no evidence that Chance was in the employ of defendants, that they exercised any control over him or that he was engaged in any undertaking in which the defendants were interested at the time when plaintiff was injured. The evidence is to the effect that defendants rent from the Wemme Estate a two-story building on Broadway in the city of Portland extending from Burnside to Couch Street. Chance applied to the defendants in July, 1915, to rent a portion of this building for the sale of used autos, and for other purposes. The evidence is fairly clear

that the defendants refused to rent him the space because he was without funds and unable to pay rent in advance. Chance had been in the automobile business at Vancouver, B. C. He had sold out this business and was expecting payment of the purchase price within a few days. A temporary arrangement was made under which some space in the building was turned over to Chance and a number of the defendants' used cars were also intrusted to him for sale. The price of these cars was approximately ten per cent higher than that which would otherwise have been charged, the defendants expecting to secure in this way a sum equivalent to a reasonable rent. The arrangement was a temporary one and the evidence of defendants is to the effect that they would have terminated the association if Chance had failed to sell cars or pay rent under an arrangement tentatively agreed upon. Chance was told to miss no sales on account of price provided the purchaser was willing to pay somewhere near the price quoted. In such case, he testifies, he was to report the facts to Mr. Harris, the defendants' sales manager, and to be guided by Harris's instructions. With the consent of defendants Chance put his own name on the window. He did some business in repairing autos and also conducted a school for instruction in such repair.

It appears by the testimony of defendant Keats that he instructed Chance that the cars intrusted to him were not to be used for pleasure, but only for business purposes. This witness testifies that the business in view was the sale of the cars and that a demonstration of the car is usually "a part of the sale." Mr. Keats testified on this subject as follows:

"Q. Suppose you had seen him out with your car on a pleasure trip alone, and you would have known that

it had been a pleasure trip; you would have protested, wouldn't you?

"A. Yes.

"Q. And perhaps you would have canceled the alleged contract between you?

"A. I certainly would have called him on the carpet for it, and I would have a right to cancel it."

Chance testifies that on July 31, Mr. Harris, sales manager for the defendants, brought a prospective purchaser of an automobile to Chance; that Chance took him for a short ride for demonstration purposes on the evening of that day and was engaged in a further demonstration of the car to this same prospective purchaser at the time of the accident. Mr. Harris takes issue with the above testimony.

It clearly appears that the sale of used or second-hand autos is a part of defendants' business. It is expressly conceded that the car which ran down plaintiff was the property of defendants.

1. Where plaintiff proves that the vehicle which caused the damage belonged to the defendant, the jury is entitled to infer that the driver was defendant's servant and that the vehicle was being used for defendant's purposes. The principle is thus stated in 1 Shearman and Redfield on Negligence, 6th ed., Section 158:

"When the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time, and that the accident was occasioned by the fault of a stranger, an independent con-

tractor, or other person, for whose negligence the owner would not be answerable."

The rule is supported by the following cases: *Norris* v. *Kohler,* 41 N. Y. 42, 44, 45; *Ferris* v. *Sterling,* 214 N. Y. 249 (108 N. E. 406, 407, Ann. Cas. 1916D, 1161); *Doherty* v. *Lord,* 8 Misc. 227 (28 N. Y. Supp. 720, 723, 59 N. Y. St. Rep. 445); *Edgeworth* v. *Wood,* 58 N. J. L. 463 (33 Atl. 940, 942); *O'Malley* v. *Heman Const. Co.,* 255 Mo. 386 (164 S. W. 565, 566); *Fleishman* v. *Polar Wave Ice etc. Co.,* 148 Mo. App. 117 (127 S. W. 660, 662–665); *Wiedeman* v. *St. Louis Taxicab Co.,* 182 Mo. App. 523–530 (165 S. W. 1105, 1106); *Howell* v. *Mandelbaum,* 160 Iowa, 119 (140 N. W. 397, 399, Ann. Cas. 1915D, 349); *Langworthy* v. *Owens,* 116 Minn. 342 (133 N. W. 866, 867); *Knust* v. *Bullock,* 59 Wash. 141, 143 (109 Pac. 329); *Kneff* v. *Sanford,* 63 Wash. 503, 505 (115 Pac. 1040, 2 N. C. C. A. 422); *Burger* v. *Taxicab Motor Co.,* 66 Wash. 676, 678 (120 Pac. 519); *Purdy* v. *Sherman,* 74 Wash. 309, 310 (133 Pac. 440).

2. These authorities proceed on the theory that the facts are peculiarly within the defendant's knowledge and if the vehicle is not in use for the defendant's purposes he can readily furnish the necessary proof. The admission of ownership made by the defendants in the case at bar was therefore sufficient to make out a *prima facie* case on the controverted questions. It is squarely held in *Kahn* v. *Home Telephone & Telegraph Co.,* 78 Or. 308, 314 (152 Pac. 240), that in every case it is for the jury to say whether this *prima facie* showing has been met by the defendant's testimony. The correctness of this decision is vigorously attacked by counsel for defendants.

If we were to hold that in a clear case the court would be justified in instructing the jury that the

defendant had overcome the inferences arising from ownership of the vehicle, such a conclusion could not help defendants in the case at bar. Defendants cannot be said as a matter of law to have overcome these inferences and plaintiff's case is by no means dependent on proof that defendants owned the car. There was evidence that at the time of the accident Chance was demonstrating defendants' car to a prospective purchaser introduced to him by the defendants. If this testimony was true the car was unquestionably being used for defendants' purposes and Chance was defendants' servant at the time of the accident. The evidence is sufficient to charge defendants with responsibility within the principles announced in *Dalrymple* v. *Covey Motor Car Co.*, 66 Or. 533, 538, 540 (135 Pac. 91, 48 L. R. A. (N. S.) 424). The court did not err in submitting the case to the jury.

3–6. Exceptions were reserved by the defendants to the following instructions given by the lower court:

"If you find from the evidence that the defendants did select this man Chance, who was driving the automobile at the time of the accident, and you further find that the defendants had the power to discharge him and had the right to direct what work should be done and the way it was to be done, then you are instructed that the said Chance was the defendants' servant at the time of the accident.

"If you find from the evidence that Chance, at the time of the accident, was defendants' servant, and you further find that Chance was demonstrating the automobile for a prospective purchaser, and that the same was done for the benefit of and in furtherance of defendants' business, then you are instructed that defendants are responsible for the acts of said Chance."

We think that these instructions correctly state the law and that they are warranted by the testimony. The right of defendants to control Chance is inferable

from the testimony of the defendant Keats and the jury was entitled to find that he was the servant of the defendants from the testimony that he was demonstrating defendants' car to a prospective purchaser furnished him by the defendants. The receipt of a stated wage is not essential to the creation of the relation of principal and agent or master and servant: *Birch* v. *Abercrombie,* 74 Wash. 486, 493 (133 Pac. 1020, 50 L. R. A. (N. S.) 59).

7. It is true, as contended, that defendants would not be liable if it could be held that Chance was an independent contractor, defendants retaining no control over him and the work not being inherently dangerous: *Macdonald* v. *O'Reilly,* 45 Or. 589, 600 (78 Pac. 753); *Winniford* v. *MacLeod,* 68 Or. 301, 306–310 (136 Pac. 25); *Oregon Fisheries Co.* v. *Elmore Packing Co.,* 69 Or. 340, 345 (138 Pac. 862); *Lintner* v. *Wiles,* 70 Or. 350, 353–358 (141 Pac. 871). This theory of the case was submitted to the jury in suitable instructions and this is all that the defendants were entitled to.

8, 9. Error is assigned on the refusal of the court to give the following instruction requested by the defendants:

"If you find from the evidence in this case that the defendants turned over and delivered to A. J. Chance the automobile in question in this case, under the contract with Chance, whereby Chance was to sell the automobile and pay the defendants a certain fixed price, and that he was to have all that he received over and above this price for his compensation and commission in making the sale, and that Chance, while out operating said automobile and demonstrating it to a contemplated purchaser, negligently and carelessly ran into and injured the plaintiff in this case, then I instruct you that the defendants would not be liable for such negligence and your verdict must be for the defendants."

This request was properly refused. The mere contract between defendants and Chance could not relieve defendants of liability if Chance were in fact under their control and especially if he were engaged in the transaction of their business at the time of the accident. The above request, if given, would have taken from the jury the evidence of Chance that at the time of the accident he was endeavoring to sell defendants' car to defendants' customer.

10. Defendants also complain of the refusal of the court to instruct the jury that they could not be held liable if the machines to be sold were put in the exclusive control of Chance, the defendants retaining no right to direct him in any respect. The court instructed the jury as follows:

"If you find from the evidence in this case that the defendants made an agreement with A. J. Chance wherein and whereby they were to turn over to Chance certain second-hand automobiles, and that after they turned over these second-hand automobiles to Chance that the defendants had no further control or direction over said automobiles; and if you further find that at the time of the accident complained of in the complaint that A. J. Chance was driving one of these second-hand automobiles belonging to the defendants, and that the said defendants had nothing to do with the automobile at the time, and that at the time Chance was demonstrating said automobile he was doing so exclusively in his own business, then and in that event you are instructed that the plaintiff cannot recover in this action, and your verdict should be for the defendants."

This instruction substantially covered the point to which the defendants' request was directed. This forecloses any contention of error in denying the request: *Domurat* v. *Oregon-Washington Railway & Navigation Co.*, 66 Or. 135, 138 (134 Pac. 313). The

other exceptions are not insisted upon. We find no error and the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued July 3, affirmed July 17, 1917.

ALBRIGHT v. KEATS AUTO CO.

(166 Pac. 758.)

Damages—Amount—Proof.

1. The *quantum* of damages is a fact to be established by the testimony, and cannot be left to surmise or speculation.

Damages—Instructions—Personal Injuries.

2. In an action for personal injuries, an instruction that if plaintiff was entitled to recover it was for the jury to determine the amount, and if they found for plaintiff to allow her such sum as would fairly and reasonably compensate her for such injuries as she "may have suffered" by reason of the accident, taking into account her physical suffering, if any, her mental anquish, if any, and the necessary expenses resulting from the accident and loss of time, if any, and that in arriving at this amount jury should find such amount as would be justified by the evidence, laying aside any question of sympathy for the plaintiff or of prejudice against the defendants, did not leave the *quantum* of damages to surmise or speculation, and did not mislead the jury, since there was evidence of physical and mental suffering of plaintiff and of her loss of time and expenses.

[As to mental anguish as element of damage in action for tort, see note in 7 Am. St. Rep. 535.]

Appeal and Error—Review—Assignments of Error.

3. Where error in the admission of evidence is argued in the brief, but no such error is assigned, the question is not before the appellate court for review.

Appeal and Error—Record—Motion for New Trial.

4. Where appellate court finds no motion for new trial in the record, it cannot consider alleged error in denying such motion.

Appeal and Error—Review—New Trial—Grounds—Excessive Damages.

5. The appellate court will not review the discretion of the Circuit Court in refusing to grant a new trial on the ground that damages are excessive.

From Multnomah: CALVIN U. GANTENBEIN, Judge.

Action by Mollie Albright against H. L. Keats and W. N. Jones, a copartnership, doing business under the name and style of H. L. Keats Auto Company, in which plaintiff obtained a verdict in her favor and defendants appealed. Affirmed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought to recover damages for a personal injury sustained August 1, 1915. The case grows out of the same accident involved in the case of *Mary M. Houston* v. *H. L. Keats Auto Company,* in which an opinion has this day been rendered. In that case the defendants admitted some facts which in this case were proved. The effect of the record is substantially the same in both cases. The ownership of the automobile which collided with plaintiff is proved in this case and the negligence of the driver is admitted. The jury found for plaintiff in the sum of $8,095.85; from a judgment entered on this verdict defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett* and *Messrs. Crawford & Eakin,* with oral arguments by *Mr. S. C. Spencer* and *Mr. T. H. Crawford.*

For respondent there was a brief and an oral argument by *Mr. W. A. Robbins.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Most of the contentions of defendants in this case are concluded by the opinion in *Houston* v. *Keats Auto*

Company. For the reasons therein stated the court did not err in denying defendants motions for a nonsuit and for a directed verdict. The instructions requested and given in this case are substantially identical with those in the Houston case and our conclusions with reference to them are as stated in the opinion in that case. It is insisted that the court erred in giving the following instruction:

"If, after careful consideration and comparison of all the evidence in this case, Gentlemen of the Jury, you come to the conclusion that the plaintiff should recover then it will be your duty to determine the amount to which she would be entitled. If you reach this point, and find for the plaintiff, then you will allow her such sum as will fairly and reasonably compensate her for such injuries as you find she may have suffered by reason of this accident, taking into account her physical suffering, if any, her mental anguish, if any, and the necessary expenses that she may have had resulting from this accident, and also loss of time, if any. In arriving at this amount, if you have occasion to do so, you will, of course, find such amount as will be justified by the evidence in this case, laying aside any question of sympathy for the plaintiff or any question of prejudice against the defendants."

1, 2. It is true, as contended, that the *quantum* of damages is a fact to be established by the testimony and it cannot be left to surmise or speculation: *Rugenstein* v. *Ottenheimer,* 70 Or. 600, 606, 607 (140 Pac. 747). But we do not think that the above charge, fairly construed, permitted the jury to speculate on the subject of plaintiff's damages. The words, "may have suffered," are perhaps unfortunate but we think it is obvious that the language was chosen with a view to withholding any expression of opinion as to whether plaintiff had suffered injuries. After using these

words the court directed the attention of the jury to the physical and mental suffering of plaintiff, her loss of time and expenses, qualifying each reference by the words "if any." There was testimony on each of these subjects. The injuries of plaintiff were clearly defined by the testimony; there was no suggestion by any witness that she was liable by reason of the accident to uncertain physical ills in the future. The court gave the jury an express direction to "find such amount as will be justified by the evidence in this case." In conclusion the court instructed the jury to disregard sympathy for plaintiff or prejudice against defendants. We cannot think that the jury was misled by this instruction.

3. It is argued in the brief that there was error in the admission of certain evidence of the witness Bales. No such error is assigned and the question is therefore not before us: *Redsecker* v. *Wade,* 69 Or. 153, 159 (134 Pac. 5, 138 Pac. 485, Ann. Cas. 1916A, 269); *Dundas* v. *Grand View Land Co.,* 79 Or. 379, 380 (155 Pac. 365).

4. Error is assigned on the denial of defendant's motion for a new trial. Under this assignment it is contended that the damages awarded are excessive and that for this reason the court erred in denying the motion. We find no motion for a new trial in the record and therefore cannot consider the alleged error: *Simon* v. *Durham,* 10 Or. 52, 55; *Landswick* v. *Lane,* 49 Or. 408, 412 (90 Pac. 490); *Williamson* v. *Roberts,* 70 Or. 126, 132 (138 Pac. 840, 140 Pac. 633).

5. We may add that it has been repeatedly held that this court will not review the discretion of the Circuit Court in refusing to grant a new trial on the ground that the damages are excessive: *Nelson* v. *Oregon Railway & Navigation Co.,* 13 Or. 141 (9 Pac. 321);

McQuaid v. *Portland & Vancouver R. R. Co.*, 19 Or. 535 (25 Pac. 26); *Kumli* v. *Southern Pacific Co.*, 21 Or. 505, 512 (28 Pac. 637); *Coos Bay Co.* v. *Endicott*, 34 Or. 573, 578 (57 Pac. 61); *Sorenson* v. *Oregon Power Co.*, 47 Or. 24, 34 (82 Pac. 10); *Lindsay* v. *Grande Ronde Lumber Co.*, 48 Or. 430, 439 (87 Pac. 145).

The judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued June 29, reversed and suit dismissed July 17, 1917.

KELLEY *v.* ANDERSON.

(166 Pac. 555.)

Mechanics' Liens—Foreclosure—Recording of Notice.

1. Where copies of recorded lien notice claim attached to complaint in mechanic's lien foreclosure were not certified or authenticated or admitted to be true copies, they were insufficient to show recording of the lien notice.

Mechanics' Liens—Foreclosure—Matters to be Proved—Recording of Lien Notice.

2. The lien notice, as recorded, is the foundation of plaintiff's right to recover in a mechanic's lien foreclosure.

[As to priority of lien as between a mortgage and a mechanic's lien, see note in **Ann. Cas.** 1916B, 634.]

Department 1. Statement by MR. JUSTICE BENSON.

Suit by James A. Kelley against Oscar Anderson and Annette Anderson to foreclose an alleged mechanic's lien. From a decree in favor of plaintiff, defendants appeal. Reversed and suit dismissed.

Department 1. Statement by MR. JUSTICE BENSON.

This is a suit for the foreclosure of a mechanic's lien. The substance of the complaint is that at the

special instance and request of the defendant, plaintiff furnished labor and materials of the reasonable value of $1,564.75, in the construction of a dwelling-house on a tract of land owned by defendant; that $1,350 has been paid thereon, leaving a balance of $214.75 unpaid; that the building was completed on January 14, 1915, and on February 1, 1915, plaintiff filed for record with the county clerk, a notice of his lien claim and attaches a copy of such notice to the complaint, making it a part thereof as exhibit "A"; and thereafter, upon discovering that an error had occurred in recording the notice, he filed a second notice of lien, on March 12, 1915, correcting such error, and this notice is also made a part of the complaint and attached thereto as exhibit "B." The prayer is for the foreclosure of the lien.

The answer, *inter alia,* expressly denies the filing for record of any lien notice. From a decree for plaintiff, defendant appeals.

REVERSED. SUIT DISMISSED.

For appellants there was a brief and an oral argument by *Mr. Henry S. Westbrook.*

For respondent there was a brief with oral arguments by *Mr. Arthur Langguth* and *Mr. Henry L. Lyons.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. Defendant insists that the decree of the trial court must be reversed for the reason that there is a total failure of proof upon the issue of filing for record a notice of the lien. The entire absence of evidence upon this point is conceded by plaintiff, but he relies

upon the doctrine announced in *Henkle* v. *Dillon,* 15 Or. 610, 617 (17 Pac. 148), wherein Mr. Justice STRAHAN says:

"Counsel for appellants insisted that there was no proof of the existence of the chattel mortgages in the record. He overlooks the effect of the pleading. Copies of said mortgages, certified by the clerk, *so as to make them evidence,* are attached to the answer of Staver and Walker, and have come here without objection. In addition to this, throughout the whole case, their existence is constantly assumed. Besides it does not appear that there was any objection in the court below to the copies attached to the answer, and so far as it appears, this objection is made in this court for the first time, and it could not for that reason be allowed to prevail."

2. The situation in the case at bar is very different. The copies attached to the complaint are not certified by the clerk nor authenticated in any manner whatever. They are nowhere admitted to be true copies and there is nothing in the record, aside from the allegations in the complaint, to indicate when, if at all, they were filed for record. The lien notice, as recorded, is the foundation of plaintiff's right to recover. We are unable to find in the pleadings or evidence anything inconsistent with defendant's denial and the decree must therefore be reversed and the suit dismissed. REVERSED. SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued June 27, reversed and remanded July 17, 1917.

DAVIS *v.* LIVERPOOL & LONDON & GLOBE INS. CO.*

(166 Pac. 534.)

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Sufficiency of Evidence.

1. Evidence *held* insufficient to warrant recovery for services performed by plaintiff at request of defendant's attorney in obtaining evidence in a suit by defendant, where the attorney had no authority to employ plaintiff, and his fees and expense account were specifically limited, and defendant not having ratified the account, nor having been informed of it.

[As to implied authority of attorney to incur expense for client to pay, see note in 132 **Am. St. Rep.** 161.]

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Ratification—Acceptance of Amount Collected.

2. The mere fact that defendants accepted money recovered by their attorney would not amount to a ratification of a void contract made by attorneys with plaintiff for obtaining evidence in the suit, unless defendants knew that the attorneys had assumed to act for them in employing plaintiff.

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Ratification—Knowledge.

3. The mere fact that defendant may have had knowledge that plaintiff was furnishing information to defendant's attorneys and assisting them in finding testimony for defendant's suit would not be notice to defendant that plaintiff was doing it with the expectation that he would be paid by defendant out of the company's share of the amount recovered in the suit.

Attorney and Client—Reimbursement for Attorney's Assistants.

4. Although an attorney may employ as many assistants in a case as he chooses to pay for, his client will not be liable therefor, unless informed of the employment, and thereafter permits it to continue.

From Multnomah: ROBERT G. MORROW, Judge.

Action by Sam H. Davis against the Liverpool & London & Globe Insurance Company, a corporation, to recover for work and labor and for alleged information furnished to the defendant. From a verdict in

*On implied power of attorney to bind client for expenses incidental to trial, including associate counsel fees, see note in 23 **L. R. A. (N. S.)** 702. REPORTER.

favor of plaintiff, defendant appealed. Reversed and remanded.

Department 1. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action to recover the sum of $1,800 for services performed and information furnished to the defendant. The complaint, in substance, is as follows:

"II. That between the 1st day of January, 1908, and the 1st day of January, 1911, at the special instance and request of defendant, plaintiff furnished to defendant certain information and performed certain services, of the reasonable value of $1,800.34; that the same became due and payable during the year 1910, and prior to January 1, 1911; that said services so rendered by plaintiff to defendant between the dates mentioned constituted a continuous employment and a continuous and running account, and did not mature until all of said services has been fully performed. * * IV. That the information so furnished and the services performed by plaintiff for the defendant, as mentioned in paragraph 'II' of this complaint, consisted of the following, to wit: That about the year 1904 the defendant had paid to Lipman, Wolfe & Company, at Portland, Oregon, on certain fire insurance policies issued by the defendant to said Lipman, Wolfe & Company, amounting to $20,200, a loss caused by fire and water, which said loss was incorrectly and by mistake adjusted on said policies at $7,153.72, and said defendant had paid the said sum to said Lipman, Wolfe & Company, as a settlement of said loss under the policies issued by defendant to said Lipman, Wolfe & Company, and aggregating a total of $20,200; that said amount was paid by mistake and by reason of an inaccurate adjustment of the loss sustained by said Lipman, Wolfe & Company, and that plaintiff was in possession of certain information with which to establish that fact; that plaintiff furnished said information, and in addition thereto procured the affidavits of George Hewitt, Herman Grim, Alexander Graham, and

R. C. Baker, and also certain other information, for and on behalf of the defendant, and by reason of said information and of said affidavits so obtained by plaintiff for defendant and by reason of said services rendered by plaintiff to defendant, said defendant was repaid by said Lipman, Wolfe & Company the sum of $5,401.05 of said original payment of $7,153.72, which said $5,401.05 has previously been paid by defendant to Lipman, Wolfe & Company as aforesaid."

Defendant answered by a general denial. There was a jury trial and verdict for the plaintiff for $750, from which defendant appeals. Additional facts appear in the opinion. Reversed and Remanded.

For appellant there was a brief over the names of *Messrs. Magill, McKenney & Brush* and *Mr. C. W. Fulton,* with an oral argument by *Mr. W. F. Magill.*

For respondent there was a brief over the names of *Mr. Gus C. Moser* and *Mr. Roy K. Terry,* with an oral argument by *Mr. Moser.*

Opinion by Mr. Chief Justice McBride.

1–4. The testimony introduced by plaintiff tended to show that in the year 1903 plaintiff was in the employ of Lipman, Wolfe & Company, that a fire occurred in its store whereby goods of considerable value were damaged, and that upon an adjustment of the losses the defendant, who, with other companies, was an insurer of the stock of goods owned by Lipman, Wolfe & Company, paid that firm the sum of $7,153.72 as its share of said loss. At the time the fire occurred plaintiff was in the employ of Lipman, Wolfe & Company and assisted in the adjustment. In 1908 he informed Mr. Treanor, who had acted as adjuster of losses between the parties, of the fact that the losses had been

over-estimated and that incorrect and fraudulent claims had been made with respect thereto; and at the suggestion of Treanor, who had no authority to act for defendant, he procured the affidavits of several persons in the employ of Lipman, Wolfe & Company in regard to the amount of the damages and gave them to John C. Shillock, an attorney of Portland, who laid them before the companies, including defendant, which had paid losses alleged to have been sustained at the fire. As a result of this information a committee was appointed by the companies interested to investigate the charges contained in the affidavits and to take such steps as might be necessary, if deemed advisable, to recover any amount over-paid on account of such losses. The result was a tentative agreement with Shillock and John F. Logan to attempt to recover the sums over-paid upon the basis of recovering fifty per cent of the amount that might be recovered; the committee agreeing to advance $100, and no more, as expenses of the investigation. Plaintiff had no communication with the committee, but was working with Logan and Shillock upon some understanding that he was to recover 25 per cent of the fee that they should collect, and was exceedingly active in urging action in the matter. Later Mr. Granger, an attorney of Seattle, was consulted by the committee, which informed him of its tentative arrangement with Shillock and Logan and intimated a desire that he should assist said attorneys, but said that it would not feel justified in paying any other sum above fifty per cent of the amount recovered. The result was that Granger saw Logan and Shillock and was accepted by them as co-counsel upon terms which are left in doubt by the evidence; but there is no testimony indicating that the committee ever agreed to any different terms

as to compensation than fifty per cent of any amount which should be recovered. Granger met plaintiff at Shillock's office and conversed with him about the matter, which ran along until 1909, when Shillock and Logan retired from the case, leaving Granger in charge. In March, 1909, plaintiff testifies that he met Mr. Gallegos, chairman of the underwriters' committee, in Shillock's office; that Gallegos asked him about the standing of the witnesses who had made the affidavits and said he had read them and knew their contents. The only testimony given by plaintiff of any changes in the method of his employment from the time when he had his conversation with Shillock, which he claims left his compensation indefinite, is practically summed up in the following excerpt from his testimony on direct examination:

"Q. Before you get through with that I will ask you to state whether or not while Mr. Shillock was handling the matter for the insurance companies there was ever any conversation with reference to compensation for your services in getting these other witnesses?

"A. There was never any distinct understanding. He talked sometimes—one time he talked about I was entitled to one-third of what they recovered. After Mr. Granger come in he told me he would have to take care of Mr. Granger, and have to cut my proportion down with his, but he would not make any direct amount for me to receive.

"Q. After having had that conversation with Shillock, you say you had this conversation with Granger in the Oregon Hotel when he told you to have nothing more to do with Shillock. Did you have any conversation at that time with Granger—Mr. Granger, pardon me—with reference to your getting any compensation for bringing these—getting these witnesses?

"A. I did.

"Q. What was that, as near as you can remember?

"A. Well, Mr. Granger says, 'Of course, you will have to take my word for it, because if you go on the stand, and they ask you the question if I have made any contract, or any written statement regarding a certain amount I want you to say, "No," that I have not.' 'Well,' I says, 'I don't know. I believe you are a gentleman, and I will take your word for it'; and I said, 'I will take a chance, anyway.' He said, 'You will find I am all right.'

"Q. Did you ever at any time ask him or anybody else for any money for your own testimony?

"A. I never did.

"Q. Did you ask them for compensation for the work in getting these other men with whom you were familiar, and concerning whom you knew what they knew about the fire?

"A. I did."

Later Mr. Granger suggested to Judge Webster that he should act with him in the collection of the claim against Lipman, Wolfe & Company and had plaintiff go to Judge Webster's office and detail what he and the witnesses he had interviewed knew about the facts. A knowledge of the existence of this testimony being communicated to Lipman, Wolfe & Company they settled the claim by paying back to the Associated Assurance Companies the sum of $25,000. Granger and Emmons & Webster retained approximately fifty per cent as fees and expenses, paying over to the insurance companies $12,500, out of which the defendant received $5,401.05 as its share. The evidence indicates that this amount was obtained largely, if not wholly, by reason of the information furnished by plaintiff and the evidence collected by him. Some of the testimony given by plaintiff was contradicted by other witnesses, but here we must assume that the facts are as plaintiff states them. It

goes without saying that neither Logan and Shillock nor Granger had any authority by virtue of their retainer to employ plaintiff to collect evidence or assist them in the case. Their fee was limited to fifty per cent of the amount collected and their expense account to $100, as plaintiff was informed, and even if he had not been so informed, the result would be the same. There is nothing in the evidence which indicates that the companies or their committee were aware that Shillock or Granger had assumed to employ him or contract with plaintiff on the companies' account, and much to indicate that they were precluded from doing so and that plaintiff knew it. The mere fact that they accepted the money collected by the attorney would not amount to a ratification of the void contract made by such attorneys, if any were made, unless they knew that the attorneys had assumed to act for them in employing plaintiff, and there is absolutely nothing here to indicate that such was the case. They had agreed with Shillock as to what his fee should be and as to how much expense he should incur on their account, and they had a right to assume that he and the other attorneys having nearly an equal interest in the recovery would not exceed their instructions and incur a liability of many hundred dollars beyond that limit. The mere fact that defendant may have known that plaintiff was furnishing information to the attorneys and assisting them in finding testimony would not of itself be notice to them that he was doing it with the expectation that he would be paid out of the company's share of the amount recovered. An attorney is at liberty to employ as many assistants in a case as he chooses to pay for, but the employment of such assistance is not a charge against his client, unless the client is informed that they are employed on his credit

and with that knowledge permits the employment to continue.

The judgment will be reversed and the cause remanded to the court below for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

MR. JUSTICE BURNETT, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued July 5, affirmed July 17, 1917.

WEBB *v.* ISENSEE.*

(166 Pac. 544.)

Trial—Conduct of Counsel—Improper Argument—Cure of Error.

1. In action for slander, where defendant's testimony contradicted that of all the plaintiff's witnesses so that his veracity was in issue, the error of plaintiff's counsel in stating to the jury in argument when he had not been a witness, that plaintiff's witnesses had testified truthfully because he had been there and heard defendant make the statements, was not cured by instructions taking such statement from the jury.

Appeal and Error—Scope of Review—Record—What Constitutes.

2. Where statement set forth in supplemental affidavits did not appear in the stenographer's notes of the trial, they were nevertheless a part of the record on appeal where the court found them to be true, and incorporated them in the bill of exceptions.

[As to misconduct in argument by counsel warranting reversal, see note in 9 **Am. St. Rep.** 559.]

New Trial—Setting Aside Judgment—Power of Court.

3. Where such mistake at law has been made as would warrant reversal, the trial court may, on motion or at its own suggestion, set aside the judgment and grant a new trial.

From Multnomah: JOHN P. KAVANAUGH, Judge.

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*On right of court to grant new trial on its own motion or on grounds other than those urged by moving party, see note in 40 **L. R. A. (N. S.)** 291. REPORTER.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action to recover damages for the alleged use of slanderous words. The complaint alleges, in effect, that at Portland, Oregon, about January 16, 1915, the defendant, William Isensee, wrongfully, maliciously, recklessly, and wantonly said in the presence of divers persons of and concerning the plaintiff, Lillie T. Webb, that she was of questionable character and repute and was conducting illicit sexual commerce with men; that between March 15th and 23d of that year the defendant, in the same manner, further said in the presence of several persons of and concerning the plaintiff that she was a "crook, perjurer, thief, and a bitch," the meaning of which terms are undertaken to be explained; and that by reason of such statements the plaintiff has been damaged to the extent of $15,000, and is entitled to exemplary damages in the sum of $10,000, for the amount of which judgment is demanded.

The answer denies each averment of the complaint. The cause was tried resulting in a judgment for plaintiff for $2,500, which determination was set aside and a new trial ordered. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Schmitt & Schmitt,* with an oral argument by *Mr. G. G. Schmitt.*

For respondent there was a brief over the names of *Messrs. Lewis & Lewis, Mr. James B. Finnigan* and *Mr. R. R. Giltner,* with oral arguments by *Mr. A. T. Lewis* and *Mr. Giltner.*

MR. JUSTICE MOORE delivered the opinion of the court.

A transcript of all the testimony given at the trial has been sent up, from which it appears I. N. Foster

testified that at Portland, Oregon, between the 15th and 23d of March, 1915, the defendant, in the presence of Oliver Irwin and the witness said of and concerning the plaintiff that she was a tramp, a crook, a perjurer, a thief, and a bitch. W. S. Hoyt testified that in such city in his presence in March, 1915, the defendant in referring to the plaintiff stated she was a bitch. W. J. Cook testified that on March 16, 1915, he with G. G. Schmitt, one of plaintiff's attorneys, went to the defendant's machine-shop in Portland, Oregon, where was tendered to the latter a cashier's check for a sum of money determined to be the reasonable rent of an apartment house owned by the defendant and occupied by the plaintiff (*Webb* v. *Isensee,* 79 Or. 114, 153 Pac. 800). Whereupon the defendant, referring to the plaintiff, inquired of Mr. Schmitt:

"How long have you been her attorney? How do you get your money out of her? She don't pay anybody. Do you take your pay in trade?"

The attorney in speaking of the plaintiff observed:

"The woman is a very old woman, or quite old," in answer to which the defendant remarked, "Well, you can't always tell, Schmitt; there is many a good tune in an old fiddle yet."

Oliver Irwin, in alluding to the sworn declarations made by I. N. Foster as hereinbefore set forth having testified he was present at the time and place mentioned by that witness, was asked in adverting to the defendant: "Did he call or refer to Mrs. Webb as a crook?" The answer was:

"He didn't refer to her at all.

"Q. Did he use the word perjurer in that conversation?

"A. No, there was nothing like that in my presence.

"Q. Did he use the word thief?

"A. No.
"Q. Did he use the word bitch?
"A. No."

The defendant as a witness in his own behalf specifically denied each statement of the several witnesses so imputed to him and also the language charged in the complaint. The cause was then argued by respective counsel and submitted. The court treating the testimony offered as insufficient to establish the averment of the complaint that the plaintiff was conducting illicit sexual commerce with men and that the words "crook" and "bitch" were not actionable *per se,* and because the complaint contained no averments of fact relating to special damages, instructed the jury to consider only the remaining parts of the charge as to whether the defendant maliciously made statements in the presence of others that the plaintiff was a perjurer and a thief. A verdict was returned for the plaintiff in the sum of $2,500, and judgment was rendered thereon as hereinbefore stated. Within the time limited the defendant's counsel moved to set aside the verdict and judgment and for a new trial on the ground *inter alia* of the misconduct of plaintiff's attorney, G. G. Schmitt. The stenographer who reported the testimony and the instructions made no note of any objections interposed or exceptions taken by counsel for either party during the argument of the cause.

In support of the motion for a new trial supplemental affidavits were filed, asserting *inter alia* that G. G. Schmitt, one of plaintiff's attorneys, who had not been a witness at the trial, in his closing argument in referring to the defendant's denial of the testimony of W. J. Cook, hereinbefore set forth, said to the jury that the defendant was a perjurer; that he perjured himself when he made such abjuration, "because I

was there and heard him say it''; that though the defendant's counsel then objected to such argument, the statement so made was not retracted, nor did the court rule upon the objection or instruct the jury in respect to the matter.

Mr. Schmitt's counter-affidavit is to the effect that the matters so set forth in the supplemental affidavits respecting the testimony given by W. J. Cook and W. T. S. Hoyt and the remarks made by the defendant in relation thereto were withdrawn by the court from the consideration of the jury, except the words ''thief'' and ''perjurer,'' and that no exception was taken to such argument as appears from the report of the official stenographer who took notes of the proceedings occurring at the trial.

In considering the motion for a new trial the court refers to the statements contained in the affidavits and says they

''constituted prejudicial error and affected the substantial rights of the defendant, and the court is further of the opinion that the instructions of the court to the jury to disregard the matters testified to by W. J. Cook concerning said conversation between said W. J. Cook, the defendant, and plaintiff's counsel, and to disregard the evidence and testimony relating to the words 'bitch' and 'crook' and certain obscene utterances attributed to the defendant, did not cure the error of the admission of the said evidence and testimony; that the admission of said testimony affected the substantial rights of the defendant, and that he was thereby prevented from having a fair trial, and for said reasons'' a new trial was ordered.

1, 2. It will be remembered that the defendant's testimony in respect to the language charged in the complaint contradicted the material sworn statements of every witness who appeared against him. It will also

be borne in mind that the testimony of Oliver Irwin disputed that of I. N. Foster in its essential particulars. As to whether the sworn denials by the defendant were entitled to credence by the jurors depended wholly upon their opinion of his veracity. If he swore falsely in respect to the plaintiff's implied unchastity, so imputed to him by Cook, as would appear from the attorney's argument, it is reasonable to infer from the verdict returned that the jury necessarily found the defendant's sworn denials of the use of the words "thief" and "perjurer," asserted to have been applied by him to Mrs. Webb, were also unworthy of belief. So that the instruction taking from the jury consideration of all statements alleged to have been made by the defendant relating to the charge of language as to the plaintiff's immoral conduct did not eliminate the question of the veracity of Isensee; and this being so the remarks of the attorney in his concluding argument "constituted," as the court found, "prejudicial error and affected the substantial rights of the defendant." It is unimportant that the statements set forth in the supplemental affidavits did not appear in the stenographer's notes of the trial, for the court having, from the evidence so submitted, found the narration to be true and incorporated it in the bill of exceptions makes such a part of the history of the cause and necessitates a consideration thereof.

3. Under the rule which formerly obtained in this state no appeal would lie from an order granting a new trial, because the judgment so set aside thereby ceased to be final and hence was not reviewable: *Fisk* v. *Henarie,* 15 Or. 89 (13 Pac. 760). Nor could an appeal be taken from an order denying a motion for a new trial: *State* v. *Clements,* 15 Or. 237 (14 Pac. 410). In order to change such procedure the statute was amended mak-

ing an order setting aside a judgment and granting a new trial, a final determination of a cause rendering the action of the court in such particular subject to review: Gen. Laws Or. 1907, Chap. 162, Section 548, L. O. L. When a cause is tried by a jury, judgment must be given in conformity with the verdict and entered within the day it is returned: Section 201, L. O. L. Since these alterations were made the granting of a new trial has not been regarded as a matter of discretion nor sanctioned by this court unless in the trial of the action such mistake of law has been made as would warrant a reversal of the judgment if it had been allowed to remain and an appeal therefrom had been taken, and in such case, in order to save the expense of a review, the rule has been settled that the trial court may upon motion or at its own suggestion set aside the judgment and grant a new trial: *Wakefield* v. *Supple,* 82 Or. 595, 602 (160 Pac. 376), and cases there cited.

In *State* v. *Blodgett,* 50 Or. 329, 344 (92 Pac. 820), where a judgment was reversed in consequence of the remarks of an attorney to the jury, it is said:

"But a case should not be reversed where improper references have been made by counsel in their argument to immaterial and irrelevant matters, unless it further appears that injury * * resulted, and that will be determined by the issue involved and the state of the evidence."

In the case at bar it is believed that the concluding argument of Mr. Schmitt, wherein he asserted that in the presence of Mr. Cook he heard the defendant use language derogatory to Mrs. Webb, and wherein he characterized Mr. Isensee's denial of such statements as perjury, gave to the attorney's observation on that occasion the character of evidence when he had not

testified on the subject; that such remarks resulted in injury to the rights of the defendant by creating in the minds of the jurors an inference that if he swore falsely in respect to the language implying unchastity to Mrs. Webb, his testimony denying that he employed the words "thief" and "perjurer" in speaking of her could not be believed; and that directing the jury not to consider any other charge than the two terms last mentioned did not cure the error.

No error was committed in setting aside the judgment and granting a new trial, and this being so the order to that effect is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued June 28, reversed and suit dismissed July 17, 1917.

HENGEN *v.* HENGEN.*

(166 Pac. 525.)

Divorce—Fault of Complainant—Right to Relief.

1. Where plaintiff suing for divorce himself showed, that he was a willing participant in the parties' numerous quarrels, and that he resorted to personal violence against defendant at least twice, he was equally in fault, and was not entitled to divorce, on the principle that one who comes into equity for relief must come with clean hands.

[As to mutuality of fault in divorce cases, see note in 86 **Am. St. Rep.** 334.]

Divorce—Granting of Suit Money—Statute.

2. The granting of suit money under Section 513, L. O. L., as amended by Laws of 1913, page 57, is an interlocutory matter, and is to be made only before decree and not afterward; and, where

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*On making charges of adultery as grounds for divorce, see notes in 18 **L. R. A. (N. S.)** 300; 34 **L. R. A. (N. S.)** 360.

On question of jurisdiction to award temporary alimony, suit money and counsel fee pending an appeal in divorce suit, see notes in 27 **L. R. A. (N. S.)** 712; **L. R. A.** 1916F, 1259. REPORTER.

the Circuit Court awarded defendant wife $500 for such purpose *pendente lite*, the award exhausted the original jurisdiction on the subject.

Divorce—Appeal—Order Granting Suit Money.

3. The granting of suit money to a wife sued for divorce might be reviewed on appeal from the decree like any other question involved.

Divorce—Cash Awards to Wife—Statutes.

4. Cash awards to a wife sued for divorce are controlled by legislation.

Divorce—Alimony—Cash Award—Statute.

5. Under Section 513, L. O. L., as amended by Laws of 1913, page 57, providing that whenever a marriage shall be declared void or dissolved the court shall have power to decree, against the party in fault, such an amount of money in gross or in installments as may be proper for such party to contribute to the other's maintenance, the cash award to a wife sued for divorce to be made in final decree is dependent upon the dissolution of the marriage, or the declaration that it is void; no alimony can be granted unless the marriage is dissolved or annulled, and even then the recovery must be from the party in fault.

Divorce—Grounds—Incompatibility of Temper.

6. Incompatibility of temper is not ground for divorce under the laws of Oregon.

From Washington: JAMES U. CAMPBELL, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

This is a suit for the dissolution of the marriage contract between the plaintiff and the defendant. The husband plaintiff founds his suit upon two counts. One is adultery alleged to have been committed by the wife with one Francis M. Hale on sundry occasions in the City of Chicago; the other is cruel and inhuman treatment in accusing the plaintiff of improper relations with other women and manifesting towards him a general nagging disposition.

The defense consists of a denial of the charges of the complaint, together with counter-charges of adultery with four different women named in the answer and cruelty of the husband in that he was extremely jealous and suspicious of the defendant without cause

and on many occasions quarreled with her and abused her and several times assaulted and cruelly beat her. She also pleads in substance that he is estopped to deny that he wrongfully deserted her for that in an Illinois court she brought suit against him for maintenance withheld from her while she was living separate and apart from him without her fault and he made the same charges against her which he states in his complaint in the instant litigation, withdrew some of them, and urged the others, with the result that the court there found in her favor that she was not to blame and decreed that he pay her certain amounts for her support. As a fourth answer she alleges the allowance by the Circuit Court *pendente lite* of a certain amount to enable her to conduct her defense and asks for an additional amount to be given her in the final adjudication. Her prayer is for this financial relief and for a dismissal of the suit. She does not seek a dissolution of the marriage relation involved.

The reply traversed the answer. After a hearing, the Circuit Court rendered a decree in substance for the dissolution of the marriage contract as prayed for by the plaintiff on condition that he pay to the defendant $11,000 within ten days from her demand upon him therefor, in default of which she should have a right to apply to the court to set aside the decree. From this determination the defendant appeals.

REVERSED AND SUIT DISMISSED.

For appellant there was a brief over the names of *Messrs. Veazie, McCourt & Veazie, Messrs. Manierre & Pratt* (of Chicago, Illinois) and *Mr. Elton Watkins,* with an oral argument by *Mr. Watkins.*

For respondent there was a brief over the names of *Messrs. Giltner & Sewall, Mr. William G. Hare* and

Mr. E. C. Lancaster (of Chicago, Illinois), with an oral argument by *Mr. R. R. Giltner.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The parties were married in Denver, Colorado, April 16, 1900, and after a married life of increasing rancor finally separated in Chicago, September 13, 1910. The plaintiff is a promoter. When he married her the defendant was a manicurist. As a side-light upon the *dramatis personae* we note that the plaintiff offered proof on cross-examination of the defendant and she admitted that prior to their marriage they made a trip from Denver to New York and back as man and wife about February, 1900. With this advertisement of each other's characters and propensities it is not to be wondered that each was suspicious of the other. In the view we take of this case it is not requisite that we should undertake to justify her conduct in any respect.

It is practically undisputed on the part of the plaintiff that he was exceedingly strict with the defendant and watched with the eye of a lynx everything she did in which other men were concerned and taunted her frequently with the fact that he had a blonde beauty who was waiting for him and would take up with him at any time. She gives much evidence of his intimacy with other women in ways that were at least questionable and indiscreet. She testifies that on one occasion she learned he had registered with another woman at the Palmer House in Chicago as G. B. Hengen and wife; that she went there and after some difficulty succeeded in gaining entrance into a bedroom where she found him and one Lillian Koch together. His account of this affair is to the effect that he became

acquainted with Miss Koch through the fact that her sister Florence was a stenographer in the employ of himself and a business associate in Chicago and that Lillian wanted to secure permanent employment and telephoned him to meet her at the Palmer House one evening about 7 o'clock for a conference on the subject. Without the knowledge of the defendant he went to meet that appointment and after conversing a while with the girl in one of the parlors of the hotel a great many people came in there for shelter from a sudden downpour of rain. He says it then occurred to him that it would not look well for him to be seen conversing with an unmarried woman under such circumstances and in such a place and to avoid the apparent impropriety he registered as B. B. Hengen and secured a private bedroom to which he took her. He claims that the door was open and the blinds up so that people could readily see into the room and that himself and the young woman were fully dressed. He is contradicted in material particulars by the defendant's evidence to the effect that the door was closed and locked and that when entrance to the room was effected after some delay he was found with his coat off. Another time the defendant went to his office and found the door locked, but could see through the frosted glass that he was walking back and forth inside. She also saw a woman moving around in the same room and after a time she secured admission and discovered him there with Lillian Koch and her sister. A scene ensued resulting in some uproar when he seized her violently and as she says dragged her across the room into an inner office. He admits quarreling with her and says he only pushed her into the room.

It appears that the friction between the two began almost immediately after the marriage. They seem

to have separated two or three times before the final disruption. She went one time from Chicago to Colorado. The plaintiff was asked:

"What was the cause of her leaving and what did she say when she left?"

He answered:

"We had our usual quarrels; she had nagged and nagged until we had a general row and it seemed that the only thing I could do was to get out and get away; the lease being pretty near up anyway, and the people had returned and wanted their flat, and we settled up there and she was going home to her people in Colorado and she left."

Speaking of an occasion in which he came home in an automobile he says:

"Mrs. Hengen immediately accused me of having the chauffeur drive me to a house of ill-fame, and I denied it and we had a quarrel and she got up and reared around.

"Q. What did she do?

"A. She holloed and I feared that the neighbors all through the block would come in.

"Q. Had you touched her or anything?

"A. I had not touched her. I finally made up my mind—I had some pride—I made up my mind if there was going to be a scene I would get out so the matter would not attract attention. And she ranted around there and I got up to go out and she tried to keep me from going out of the front door fifteen or twenty feet from where I stood and I shoved her aside a like that [indicating] and I went out and she screamed and before I got halfway downstairs people in the same building—(that entrance that I went out of I think served six people), so some of those people came out to see what the trouble was; I was well ashamed of having anything occur at my home that attracted attention and I went out and went away.

"Q. Did you strike her at that time?

"A. No, sir.
"Q. She claims her lips were cut and arms bruised.
"A. She fell against a book case in the hallway.
"Q. Did you strike her?
"A. No, sir. I pushed her away so I could go out."

Her story of this occurrence is that he knocked her down with his fist. A neighbor and his wife came in a few minutes after the plaintiff left on this occasion and testify that her lip was cut and bleeding and her arm was skinned and bleeding from the wrist to the elbow. He gives also the following testimony:

"Q. You do not claim that you are free from resenting these things when she accused you of them? You resented the accusations?
"A. I certainly did.
"Q. Did you call her any bad names?
"A. You know what you would do in a quarrel, you will say a good many things. I don't know that I used any profanity. You know what you would do when you have had a quarrel.
"Q. * * Would you say that she lied?
"A. Yes, sir; I may say she lied because she did lie. * *
"Q. Did you ever accuse her of adultery or anything of that kind?
"A. I don't think I did."

He admits going to Chicago Heights with Lillian Koch and this was one of the elements of the altercation in his office where he shoved the defendant into an inner room. He also concedes that he went alone to the Hilker residence to play cards with Mrs. Hilker and met her by appointment at a hotel in Chicago. There is much evidence of his being very attentive to a Miss Mills at various times in the afternoons and late at night. The defendant and her sister testify that Mrs. Hilker confessed to them that she had committed adultery with the plaintiff and as a result had

procured an abortion to be performed upon herself. It is said in *Wheeler* v. *Wheeler,* 18 Or. 261 (24 Pac. 900), that if a wife has reason to suspect her husband of infidelity it is not cruel or inhuman to charge him with it, citing *Kennedy* v. *Kennedy,* 73 N. Y. 374. From the plaintiff's own statements under oath it is plain that he was on several occasions guilty of at least questionable conduct with other women and gave his wife good cause to inquire about it. The whole married life of the parties seems to have been clouded with distrust and jealousy. Neither had confidence in the other and considering their antenuptial relations we cannot wonder at it. Parties who were guilty of the lecherous escapade to New York and return would most likely doubt each other when the sacred relation of husband and wife was consummated.

In *Beckley* v. *Beckley,* 23 Or. 226 (31 Pac. 470), speaking by Mr. Justice MOORE, this court laid down the rule thus:

"To entitle one to a decree of divorce for cruel and inhuman treatment, the injured party must come into a court of equity free from the suspicion that he has contributed to the injury of which he complains. Divorces should not be granted by weighing the evidence and decreeing in favor of the one least guilty, where both have taken an active part in the mutual discord. Equity relieves the injured party, but not the vanquished. In the struggles for supremacy, or to vent spleen, spite or hatred, the willing actors may fight out the battles of wedded life, but they cannot invoke the aid of equity after their own efforts have failed."

It was also said in *Jones* v. *Jones,* 44 Or. 586 (77 Pac. 134), that where the plaintiff was a willing and active participant in the quarrels and assaults of which she complained she was not entitled to a divorce. On the principle that one who comes into a

court of equity for relief must come with clean hands the following precedents may be read with profit in this connection: *Taylor* v. *Taylor,* 11 Or. 303 (8 Pac. 354); *Adams* v. *Adams,* 12 Or. 176 (6 Pac. 677); *Wheeler* v. *Wheeler,* 18 Or. 261 (24 Pac. 900); *Mendelson* v. *Mendelson,* 37 Or. 163 (61 Pac. 645); *Crim* v. *Crim,* 66 Or. 258 (134 Pac. 13); *Matlock* v. *Matlock,* 72 Or. 330 (143 Pac. 1010). We do not attempt to justify the conduct of the defendant in her relations with her husband. She stoutly denies the charge of adultery against her. We do not find it necessary to further investigate that charge. Out of his own mouth the plaintiff states enough to show that he was a willing participant in their numerous quarrels and that he resorted to personal violence against the defendant at least twice. Whether he shoved her or struck her, it is practically without dispute that he inflicted severe injury upon her. The court will not differentiate between the terms used to designate his brutality or decide whether he struck or shoved her. It is enough to say that he is proved to be much in fault and that he does not come into chancery with that clear record which alone entitles him to relief.

1. The only remaining question to be considered is the defendant's demand for an additional allowance for the expense of defending the suit. The Circuit Court made its decree of divorce in favor of the plaintiff conditional on his paying the defendant $11,000. As amended by the act of January 31, 1913, Section 513, L. O. L., provides:

"Whenever a marriage shall be declared void or dissolved the court shall have power to further decree as follows:

* * "3. For the recovery of the party in fault, such an amount of money, in gross or in installments, as

may be just and proper for such party to contribute to the maintenance of the other."

In the preceding section it is said:

"After the commencement of a suit, and before a decree therein, the court or judge thereof may, in its discretion, provide by order as follows: 1. That the husband pay, or secure to be paid, to the clerk of the court, such an amount of money as may be necessary to enable the wife to prosecute or defend the suit, as the case may be. * * "

2–5. It is manifest that the granting of suit money is an interlocutory matter and is to be made only before decree and not afterwards. In this case the record discloses that the Circuit Court awarded the defendant $500 for this purpose, *pendente lite.* This exhausted the original jurisdiction on that subject. Of course this branch of the case might be reviewed on appeal on the authority of *O'Brien* v. *O'Brien,* 36 Or. 92 (57 Pac. 374, 58 Pac. 892), like any other question involved, except for the fact that there is no testimony before us about the amount or items of the defendant's necessary expenses in defending this suit. Any additional allowance, therefore, in this court would be arbitrary and without justification in the record. All these matters are controlled by legislation and the doctrine is taught in *Taylor* v. *Taylor,* 70 Or. 510 (134 Pac. 1183, 140 Pac. 999), that such allowances depend entirely upon the statute and unless there is an enactment authorizing it no money decree can be entered in a divorce suit against either party for any purpose. Moreover, the cash award to be made in a final decree is dependent upon the dissolution of the marriage or the declaration that the same is void. In other words, no alimony can be granted unless the marriage is dissolved or annulled. Even then the re-

covery must be from the party in fault. In this respect the decree of the Circuit Court was illogical and wholly at variance with the statute. If the plaintiff was the party in fault he was not entitled to a decree for the dissolution of the marriage. If he was not to blame he is not within the category of the code prescribing that the recovery of money must be from the party in fault.

6. It was earnestly argued at the hearing that the parties were irreconcilable; that it was impossible for them to live together in peace and that the defendant ought to take the $11,000 and let the decree stand. Incompatibility of temper, however, is not a ground for divorce under the laws of this state and to approve the money feature of this decree would be to say in effect that a divorce may be purchased by a party desiring it whether he is at fault or not. As we have shown by his own testimony, the plaintiff is largely deserving of censure in his conduct towards the defendant and is therefore not entitled to relief in a court of conscience. As alimony is grounded by statute solely upon the dissolution or annulment of the marriage relation there can be no allowance to the defendant where the divorce is denied. It is not necessary to consider the effect of the Illinois decree for the maintenance of the present defendant. If by mutual concessions and a forgiving spirit they cannot settle their differences the parties must work out a solution on some other basis than that disclosed in the record before us. The decree of the Circuit Court is reversed and the suit dismissed.

REVERSED AND SUIT DISMISSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued June 22, modified July 17, 1917.

MICKENHAM *v.* GRALAPP.

(166 Pac. 553.)

Vendor and Purchaser—Purchase-money Notes—Reductions—Partial Failure of Title.

1. Where the actual survey would have deprived the vendees of 10 feet from one side of the tract conveyed, but their grantor and his predecessors had, since 1903, all conveyed and held in accordance with an old division fence and with other fences which inclosed the amount of acreage conveyed, the vendees were entitled to no reduction from the purchase-money notes given at sale in 1912.

[As to what is a marketable title, see note in 132 Am. St. Rep. 992.]

From Marion: WILLIAM GALLOWAY, Judge.

Department 2. Statement by MR. JUSTICE HARRIS.

This is a suit to foreclose a purchase price mortgage. On November 23, 1912, Ferdinand M. Mickenham conveyed fifteen acres of his land to Henry H. Gralapp and his wife Amelia Gralapp for $3,375. Part of the purchase price was paid and the remainder, amounting to $1,575, was satisfied by the Gralapps giving their note secured by a mortgage on the land. The deed embraces a single tract of fifteen acres; but, because of the nature of the claim made by the defendants, it is necessary to keep in mind the fact that, at the time of the sale, a division fence ran through the premises owned by Ferdinand M. Mickenham leaving ten acres on the east and the remainder of his premises on the west side of the division fence. The ten-acre tract was rectangular in form and was inclosed by four fences, with the division fence serving as the west boundary. The Gralapps allege that Mickenham pointed out these fences as the boundaries of the ten-acre tract; that they understood that they were to re-

ceive all the land within the four fences inclosing the ten-acre tract; and that the remaining five acres should be taken from the Mickenham lands on the west side of the division fence. It is admitted that the description appearing in the deed embraces fifteen acres, but the defendants claim that a survey discloses that the east line of the land described in the deed is west of the fence pointed out as the east line of the ten-acre tract, leaving a strip about thirty-two feet at the south end and about 27 feet at the north end between the east line of the land described in the deed and the fence shown as the east boundary of the ten-acre tract. The Gralapps took possession of all the land within the fences of the ten-acre tract and planted berries and fruit trees along the east side. The defendants allege that since the true boundary line does not include all the land within the fences they will lose part of the berries and fruit trees; and they contend that they are entitled to charge this loss and other alleged damages against the note. After a trial, the Circuit Court found that the Gralapps had been damaged in the sum of $375, reduced the note to $1,200 and awarded a judgment to the plaintiff, Wm. Mickenham, who is the assignee of the note and mortgage, for $1,200 with interest, and granted a decree foreclosing the mortgage. The plaintiff appealed.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. Walter C. Winslow.*

For respondents there was a brief over the names of *Messrs. Smith & Shields* and *Mr. Allan A. Hall,* with an oral argument by *Mr. Guy O. Smith.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. This appeal presents a pure question of fact, for as said by the defendants in their printed brief: "Little controversy arises here as to the law." To decide a single question of fact is to decide this suit. The fact to be decided is whether the deed to the Gralapps conveyed all the land included within the four fences which inclose the ten-acre tract. The plaintiff admits that he has no better right than his assignor Ferdinand M. Mickenham. All parties concede that the deed conveys fifteen acres and that in any event the grantees are the owners of fifteen acres. The defendants say that Ferdinand M. Mickenham pointed out the four fences as the boundaries of the ten-acre tract, and they allege that the deed does not include all the land within the four fences. The plaintiff admits that the four fences were pointed out to the Gralapps as the boundaries of the ten-acre tract, but Mickenham contends that the east line of the description in the deed coincides with the fence which was pointed out as the east line of the ten-acre tract. In brief, the plaintiff insists that the deed does. and the defendants contend that it does not include all the land within the four fences inclosing the ten acres. If the deed conveys to the Gralapps all of the land within the four fences of the ten-acre tract, then they are not entitled to any reduction on the note. A brief narrative of the various transfers affecting the lands purchased and sold by Ferdinand M. Mickenham will make it clear that the deed to the Gralapps conveyed to them all the land within the four fences which were pointed out as the boundaries of the ten-acre tract.

Charles Swegle owned a rectangular tract of land which will be referred to as the eighty, for the reason

that the witnesses speak of it as the eighty, although an actual survey shows that the tract embraces 82.28 acres. In 1888 Charles Swegle conveyed the eighty to Mrs. Bender. At some subsequent time a dispute arose between Mrs. Bender and the Swegle heirs concerning the validity of the deed to her, and they compromised the dispute by dividing the eighty, Mrs. Bender taking the west half and the Swegle heirs taking the east half. These two halves are spoken of in the record as the west and east forties and we shall likewise refer to the halves as the forties.

L. K. Page acquired the west forty and afterwards on June 10, 1903, he conveyed this forty to Ferdinand M. Mickenham. When Mickenham purchased from Page, a fence stood as the east boundary of the west forty; and this fence will be called the old division fence for the reason that it had the appearance of being the division line between the west and east forties. Isaac Lynch as the owner of the east forty cultivated up to this fence and Mickenham, as the owner of the west forty, cultivated all the ground on the west side of the fence. When Mickenham purchased from Page the west forty was in a single field and, with the exception of 1.20 acres in the southeast corner used for school purposes, the east forty was also in a single field.

Charles M. Walker acquired 20 acres off the west end of the east forty and subsequently, on May 27, 1908, he conveyed this twenty acres to Ferdinand M. Mickenham by a deed which describes the place of beginning as a "point being the northeast corner of a tract of land deeded by L. K. Page to F. Mickenham on June 10th, 1903." Walker had measured this 20 acres, using the old division fence as the place of beginning, and Mickenham also measured the 20 acres,

with the division fence as the starting point. Two or three years after his purchase of the twenty acres off the west end of the east forty, Mickenham sold the east 10 acres of the twenty-acre tract to his son and the ten acres sold to the son were measured by first measuring ten acres from the east side of the old division fence, and then measuring the remaining ten acres for the son. The son erected a fence along the east line of his ten-acre tract and the fence may be regarded as the line which divides the two twenties of the east forty. The son also erected a fence along the west line of his ten-acre tract and this is the fence which was pointed out as the east line of the ten-acre tract subsequently sold to the Gralapps. The deed from Mickenham to the Gralapps is not in evidence but it appears from the mortgage, which is in evidence, that the description is tied to the "Northeast corner of a tract of land deeded by L. K. Page to F. Mickenham on June 10, 1903."

The defendants caused a survey of the eighty to be made in October, 1915. The surveyor ran around the "whole tract; then I made a division, making an equal number of acres in each half"; but, in making the division, the "schoolhouse land" aggregating 1.20 acres was excluded from the calculation. If the division line laid out by the surveyor is to govern, then the east line of the land described in the conveyance to the Gralapps would fall to the west of the fence pointed out as the east boundary of the ten-acre tract. It is not clear from the record whether the "schoolhouse land" entered into the calculation when Mrs. Bender and the Swegle heirs divided the eighty. If the "schoolhouse land" was not considered when the land was divided between Mrs. Bender and the Swegle heirs, that circumstance might account for the differ-

ence between the old division fence and the line laid out by an actual survey as the exact division line of the whole tract. However, it is not necessary to speculate upon possibilities nor need we attempt to locate a line which will divide the eighty into exactly equal halves, for it is too late now to divide the land anew. Mickenham bought the west forty in 1903 and had continuously claimed and farmed all the land on the west side of the old division fence until he sold to the Gralapps. The sale by Walker to Mickenham was made with reference to the old division fence; the sale from Mickenham to his son was made with reference to the old division fence; the fence dividing the east forty into halves was located with reference to the old division fence; and the fence forming the west line of the ten acres sold to Mickenham's son was located and erected with reference to the old division fence. The Gralapps were shown the old division fence as the west boundary of the ten-acre tract; and the fence which Mickenham's son erected as the west boundary of his tract was shown to the Gralapps as the east boundary of the ten-acre tract. The east line of the forty purchased from Page by Mickenham coincides with the old division fence. Ferdinand M. Mickenham owned and the Gralapps purchased and received all the land between the fences inclosing the ten-acre tract; and, therefore, the defendants are not entitled to any reduction on the note. The decree of the Circuit Court is modified and the plaintiff is awarded a judgment for the unpaid balance due on the note, $150 for attorney's fees, costs and disbursements in both courts and a decree foreclosing the mortgage.

MODIFIED.

MR. JUSTICE BEAN, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Submitted on briefs May 31, reversed and remanded July 17, 1917.

STATE v. RANDOLPH.

(166 Pac. 555.)

Animals—Larceny—Stock Brand—Evidence of Ownership and Identification.

1. Laws of 1915, page 43, makes the state veterinarian state recorder of brands, and requires all brands to be recorded with him and not elsewhere, and provides that "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted in any court of this state, unless the brand shall have been recorded as provided in this act," and that one who has had a brand recorded in any county for the greatest length of time shall have the exclusive right for 60 days to have said brand recorded. G. had had the brand HU recorded in his county under a prior statute, but failed to comply with the 1915 law. M. had complied with the 1915 law and secured a certificate of his exclusive right to the use of the same brand. R. was charged with stealing a steer subsequent to the time when the 1915 law became effective. There was testimony that R. had killed a steer, and that the hide from such steer had an HU brand; R. claiming that he had bought the steer. *Held*, that a certified copy of the certificate issued to M. was properly admitted in evidence, and that a certified copy of G.'s certificate as well as oral evidence that G. had placed an HU brand on the right hip of his cattle was properly excluded.

[As to brands on animals as evidence of ownership, see note in Ann. Cas. 1913E, 133.]

Animals—Constitutional Law—Brands—Statutory Regulation—Vested Rights.

2. Laws of 1915, page 43, providing that ownership or identification of stock shall not be permitted to be proved by brands not recorded, since it does not make recorded brands conclusive evidence of ownership, is not invalid; it being merely a rule of evidence in which no one has a vested right.

Criminal Law—Refusal to Instruct—Prejudicial Error.

3. In a prosecution for stealing a steer, where the evidence for the state was circumstantial, and defendant had offered evidence tending to explain possession, it was prejudicial error to refuse to instruct concerning the possession of the stolen goods.

From Klamath: DELMON V. KUYKENDALL, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

C. C. Randolph was convicted of a violation of Section 1950, L. O. L., upon an indictment which charges that he stole a steer in Klamath County, on Novem-

ber 20, 1915, belonging to M. S. Mayfield. Randolph resided on a homestead in the forest reserve in Klamath County. On March 30, 1916, he was seen at his home skinning the right hind quarter of a beef. Randolph was arrested on April 6, 1916, and on that day two barrels and a keg were found in his house containing pickled meat. The defendant had placed the hide in water for the purpose of slipping the hair; and when asked for the hide on the day of his arrest he produced it. When examined, it was discovered that part of the hide had been scalloped or cut out and beneath the scallop on the right hip was a brand which the witnesses described as HU connected. The brand was described by one of the witnesses as a hair brand, for the reason that it was not deep and did not show distinctly.

M. S. Mayfield lives on a ranch which he owns in Crook County, and he also owns a ranch in Klamath County "a little farther" than two and a half miles from the Randolph homestead. In addition to cattle kept by him in 1915 on his two ranches, Mayfield placed one hundred head on range within the forest reserve. Among the hundred head were twenty-five three year old steers, and among the three year old steers was one Hereford which Mayfield had purchased in Wyoming when it was a calf. When Mayfield purchased this Hereford it had a double bit ax brand on each hip and, in the spring of 1913, he put his brand on the right hip and below the double bit ax brand. Mayfield claimed that the hide produced by Randolph on April 6, 1916, was the hide of the three year old Hereford steer that had originally been purchased in Wyoming.

Mayfield has been in the cattle business for more than twenty years and, since about 1900, has used a

brand which is described as HU connected. On July 23, 1915, the state veterinarian as state recorder of brands issued, filed and recorded a certificate awarding to M. S. Mayfield the exclusive right in the state to brand cattle on the right hip with . In addition to other evidence offered for the purpose of showing that Mayfield owned the animal from which the hide was taken, a certified copy of the certificate issued by the state veterinarian was received in evidence over the objection of the defendant.

Randolph attempted to offer evidence tending to show that the HU brand had not been used by Mayfield exclusively, but that it had also been used by B. S. Grigsby. The court sustained the objections of the state and refused to permit the introduction of any evidence concerning the Grigsby brand. B. S. Grigsby has been a stock-raiser residing in Klamath County for about thirty-eight years; and, during the last thirty years of that period, the only brand used by him has been an HU connected. Although Grigsby used this one brand for many years he did not attempt to record it until May 26, 1914, when he filed a certificate with the county clerk of Klamath County claiming "the sole and exclusive right" to use an on the right hip of cattle, and the county clerk duly recorded a certificate purporting to grant the right claimed. Grigsby always branded cattle purchased by him immediately after the purchase and those raised by him were branded when they were "from two weeks to two or three months old." During the season of 1915 Grigsby had cattle running on the range in Klamath County. Three head were missed in the fall of 1915 and while two were found in February or March, 1916, the third was never located. The evidence does not disclose the exact distance, but

it is a fair inference to say that some of the Grigsby cattle ranged from twenty to forty miles from the place where the one hundred head of Mayfield cattle were ranging in the forest reserve. Randolph claimed that he bought the beef "from a couple of men that came through my place the latter part of October" in 1915.

The principal assignments of error relate to the ruling of the court in receiving the certified copy of the certificate issued to Mayfield, an instruction to the jury concerning the effect of the Mayfield certificate, the refusal of the court to permit the defendant to introduce a certified copy of the Grigsby certificate recorded in Klamath County or to offer oral evidence showing that Grigsby had placed an HU brand on the right hip of his cattle or that the cattle missed by him in 1915, had been branded HU on the right hip, the refusal to give three requested instructions on circumstantial evidence, and a failure to give a requested instruction relative to the possession of stolen property.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED AND REMANDED.

For appellant there was a brief over the name of *Mr. W. H. A. Renner.*

For the State there was a brief over the names of *Mr. John Irwin* and *Mr. N. G. Wallace.*

MR. JUSTICE HARRIS delivered the opinion of the court.

1. The refusal of the trial court to allow evidence concerning the Grigsby brand was based upon the theory

that the statute in force at the time of the trial prohibited the court from receiving the evidence offered by the defendant. If it was competent to show that Grigsby used an HU brand on the right hip of his cattle it must necessarily follow that the ruling of the court was prejudicial error. The correctness of this ruling depends upon the validity of Chapter 33, Laws 1915, which was in force at the time of the commission of the alleged crime as well as at the time of the trial; and, hence, it becomes appropriate first to notice the statutes regulating brands before the passage of Chapter 33 and then to call attention to the provisions of the latter statute.

When the Grigsby brand was recorded the law required that "all brands shall be recorded in the county where owner resides, and in such other county where such animals usually range; and no evidence of ownership by brand" was permitted in any court unless such brand was recorded: Section 5524, L. O. L. A person desiring to use a brand made and signed and then filed with the county clerk in the county where he resided or in the county where his cattle usually ranged, a certificate containing a facsimile and description of the brand, and a designation of the place on the animal where it was intended to apply the iron; and from the time of the filing of such certificate the person filing it had the exclusive right to use such brand within that county: Section 5525, L. O. L. In all proceedings where the title of stock was involved "the brand on an animal shall be *prima facie* evidence of ownership of the person whose brand it may be; provided, that such brand has been duly recorded as provided by law." Proof of the right of a person to use such brand was made by a certified copy of the record: Section 5528, L. O. L.

A new statute regulating brands and repealing Sections 5524, 5525 and 5528, L. O. L., was adopted when Chapter 33, Laws 1915, was enacted. By the provisions of this statute the state veterinarian is made state recorder of brands and all brands must be recorded with him and not elsewhere. Any person desiring to adopt a brand is required to make and file with the recorder of brands a certificate substantially like the one required under the previous statute and it then becomes the duty of the recorder of brands to record the certificate in a book kept for that purpose and to issue a certificate to such person who, from that time, has "the exclusive right to use such brand within the state." Section 3 reads thus:

"No evidence of ownership of stock by brands or for the purpose of identification shall be permitted in any court of this state unless the brand shall have been recorded as provided in this act."

The statute also provides that:

"All applications to have brands recorded shall be held by said state veterinarian for the period of sixty days after this act goes into effect before the same are recorded and that in the event two or more persons, firms, associations or corporations make application to have the same brand recorded, the one who has had said brand recorded in any county in this state for the greatest length of time shall be entitled to have said brand recorded with the state veterinarian. The evidence of the record in such county shall be furnished by a certificate of the county clerk; and provided further, that the state veterinarian shall not file or record any brand if the same has already been filed or recorded by him in favor of some other person, firm, association or corporation but shall return such fee and facsimile to the person, firm, association or corporation sending the same": Section 4.

The brand on an animal is declared to be *prima facie* evidence that the animal belongs to the owner of the brand; provided, the brand has been "duly recorded as provided by law"; and according to the terms of Section 8

"proof of the right of any person to use such brand shall be made by a copy of the record of the same, certified to by the state veterinarian in accordance with the provisions of this act, or the original certificate issued to him by the state veterinarian. Parol evidence shall be inadmissible to prove the ownership of a brand."

The only difference between the Mayfield and Grigsby brands is that in the Mayfield brand the lower end of the U is square, while in the Grigsby brand it is circular. This difference, however, is so slight that both brands are for all practical purposes the same, and the state recorder of brands would be warranted in refusing a certificate to use one after having issued a certificate to use the other. The defendant makes no claim arising out of this slight difference; and, moreover, the right to offer evidence of the Grigsby brand depends upon whether it is competent for the legislature to prohibit proof of ownership or identification by a brand which is not recorded by the act of 1915.

It is a fair inference to say that in any event the brand appearing on the hide found in the possession of Randolph was placed there before Chapter 33, Laws 1915, became effective, since all the evidence points to the conclusion that the hide came from a matured animal. If the brand was placed there by Mayfield it was done in the spring of 1913; and if Grigsby branded the animal he did it before Chapter 33 became operative. When Grigsby recorded the

HU brand in Klamath County on May 26, 1914, he acquired the sole and exclusive right to use that brand in that county; and he not only acquired the exclusive right to use that brand in Klamath County but by the terms of Section 5528, L. O. L., an animal found with that brand in Klamath County *prima facie* belonged to Grigsby. Moreover, during the entire period from May 26, 1914, until Chapter 33, Laws 1915, became effective, evidence concerning the Mayfield brand would have been inadmissible to prove that Mayfield owned any animal with the HU brand, although it would have been competent to offer evidence of the Mayfield brand for the purpose of proving identification as distinguished from ownership: *State* v. *Henderson,* 72 Or. 201, 203 (143 Pac. 627).

The act of 1915 was designed as a substitute for previous legislation regulating the use of brands. Under the old law one stock owner might record a brand in one county and another owner could record the same brand in another county; and this frequently resulted in litigation. Apparently the new law was devised for the purpose of producing uniformity and to prevent two different owners from using the same brand anywhere in the state. The new law gives an exclusive right to the whole state while the old law gave an exclusive right only in the county or counties where the certificate might be filed. Both the old and the new law make a recorded brand *prima facie* evidence that the owner of the brand owns the animal upon which the brand is found. Both laws prohibit proof of ownership of an animal by proof of the use of an unrecorded brand. The old law did not prohibit evidence of the use of an unrecorded brand to prove identity, but the new law does prohibit a party from

offering evidence of an unrecorded brand for the purpose of identifying an animal.

The act of 1915 recognized the fact that brands had been recorded in the different counties of the state and ample provision was made to enable the owner of a recorded brand to preserve his right by recording his brand with the state veterinarian. Inasmuch as Grigsby had recorded his brand under the old law, he could have preserved his right to the exclusive use of that brand by complying with the requirements of the new law; but he made no attempt to preserve his right, and consequently when the sixty day period fixed by Chapter 33 had expired, Mayfield was entitled to a certificate granting to him the exclusive right to use the HU brand throughout the state. Since Mayfied did and Grigsby did not comply with the new law the latter has lost and the former has acquired the exclusive right to use the HU brand not only in Klamath County but also throughout the entire state. Grigsby cannot do what he previously could do and Mayfield can do what he previously could not do in Klamath County.

It is conceded that the state can regulate the use of brands by providing that one brand can be used by only one stock owner. The state has power to provide for the method of acquiring and preserving the exclusive right to use a single brand.

When the legislature passed the act of 1915 and required brands to be filed anew, it was merely exercising the power to regulate brands and, when Grigsby failed to comply with the new regulation, he lost the right any longer to brand cattle with the HU brand on the right hip. The rules of evidence as declared by the legislature depended, under the old law, upon the existence of the right to use a recorded brand; and so, too, under the new law the rules of evidence are gov-

erned by the right to use a recorded brand. Now as before the right to use a recorded brand carries with it the right to use the brand as evidence. When Grigsby had the right to use the brand he also enjoyed the right to use it as evidence of ownership and, when the right to use the brand was transferred to Mayfield, the rules of evidence accompanied the right. Although it may be doubtful, therefore, whether strictly speaking the act of 1915 has changed the rules of evidence in any particular, except as to proof of identification, nevertheless for the purposes of this discussion the present statute may be regarded as having changed the rules of evidence concerning brands. When Grigsby had the right to the exclusive use of the HU brand in Klamath County he could show that he was, *prima facie,* the owner of an animal branded HU by proving his right to use that brand. That part of the old statute which provided: (1) That ownership of a branded animal could be proved by ownership of the brand; and (2) that the branded animal *prima facie* belonged to the owner of the brand, was merely a legislative declaration of a rule of evidence; and so, too, that part of the new statute which prohibits the use of an unrecorded brand to prove either ownership or identification, as well as that part which makes a recorded brand *prima facie* evidence of ownership, is only a legislative declaration of a rule of evidence. The state has power to prescribe the rules of evidence which shall be observed by its judicial tribunals: *Fong Yue Ting* v. *United States,* 149 U. S. 729 (37 L. Ed. 905, 13 Sup. Ct. 1016); *State* v. *Dunn,* 13 Idaho, 9 (88 Pac. 235); 11 Am. & Eng. Ency. of Law, 550; 8 Cyc. 924; 1 Wigmore on Evidence, § 7. A consideration of the rules of evidence found in Chapter 33, Laws 1915, involves the legislative declaration: (1) That a recorded brand is

prima facie evidence that the owner of the brand owns an animal having the brand; and (2) that proof of ownership or identification cannot be made by a brand which is not recorded "as provided in this act."

The legislature can enact a statute making proof of one fact *prima facie* evidence of the main fact in issue, and the enactment of such a statute is but the declaration of a rule of evidence; and, hence, the statute making proof of a recorded brand *prima facie* evidence that an animal bearing that brand belongs to the owner of the brand is a valid declaration of a rule of evidence, because the statutory evidentiary fact is closely related to and naturally tends to prove the main fact, the ownership of the animal: *Mobile etc. R. Co.* v. *Turnipseed,* 219 U. S. 35 (31 Sup. Ct. 136, Ann. Cas. 1912A, 463, 464, 32 L. R. A. (N. S.) 226, 55 L. Ed. 78); 10 R. C. L. 864.

In the earlier history of the state the legislature merely provided for the recording of brands without declaring any rule of evidence upon the subject; and this court held that evidence of the recorded brand was evidence to be considered with other evidence of ownership, but the brand was not implied notice that the owner of the recorded brand owned the branded animal: *Stewart* v. *Hunter,* 16 Or. 62, 66 (16 Pac. 876, 8 Am. St. Rep. 267). See also *Hurst* v. *Territory,* 16 Okl. 600 (86 Pac. 280). Subsequently the legislature created a rule of evidence making a recorded brand *prima facie* evidence of ownership, and the right to declare a recorded brand *prima facie* evidence of ownership has been recognized in Oregon and in every other state where cattle are raised on the range: 3 C. J. 42; *Brown* v. *Moss,* 53 Or. 518, 522 (101 Pac. 207, 18 Ann. Cas. 541); *State* v. *Brinkley,* 55 Or. 134, 136 (104

Pac. 893, 105 Pac. 708); *State* v. *Garrett,* 71 Or. 298, 307 (141 Pac. 1123).

The legislature of this state, as in many other jurisdictions, also prohibited evidence of an unrecorded brand to prove ownership: *Johnson* v. *State,* 1 Tex. App. 333; *Dreyer* v. *State,* 11 Tex. App. 631; *Murray* v. *Trinidad Nat. Bk.,* 5 Colo. App. 359 (38 Pac. 615); *Territory* v. *Meredith,* 14 N. M. 288 (91 Pac. 731); *Territory* v. *Smith,* 12 N. M. 229 (78 Pac. 42); 3 C. J. 41; 25 Cyc. 108. No decision of this court has denied the authority of the legislature to prohibit the use of an unrecorded brand to prove ownership; but, on the contrary, every adjudication has recognized the validity of that part of the statute which since 1893 has prohibited proof of ownership by evidence of an unrecorded brand.

Since the statute only prohibited the use of an unrecorded brand to prove ownership and the prohibition did not also include proof of the identity of an animal it was held here, as in other jurisdictions where similar statutes were involved, that an unrecorded brand could be used as evidence to identify the animal: *State* v. *Hanna,* 35 Or. 195, 198 (57 Pac. 629); *State* v. *Morse,* 35 Or. 462, 467 (57 Pac. 631); *State* v. *Henderson,* 72 Or. 201, 203 (143 Pac. 627); *State* v. *Cardelli,* 19 Nev. 319 (10 Pac. 433); *Chesnut* v. *People,* 21 Colo. 512 (42 Pac. 656); *Brooke* v. *People,* 23 Colo. 375 (48 Pac. 502); *Chavez* v. *Territory,* 6 N. M. 455 (30 Pac. 903); 1 R. C. L. 1082; 1 Ency. of Ev. 889; 3 C. J. 42; 25 Cyc. 109. The reason for this ruling arises out of the fact that the finding of an animal bearing the brand used by a person involves: (1) The ownership of the animal; and (2) the identity of the animal. The distinction is clearly drawn in 1 Wigmore on Ev., Section 150, where the author says:

"When an animal is found in B's possession, and the animal bears a brand or other mark, and one of the issues is whether A is the owner of the animal, it is a natural and immediate inference that the animal belongs to the person whose brand it bears, and, if that brand is A's, then A. This inference, however, while sufficiently probable in the light of practical experience, is in truth a composite one, made up of two steps: (1) first, the inference, from the presence of A's usual mark, that A placed this particular mark,—a genuine argument under the present principle, from a trace to the source of the trace; and (2) secondly, the inference from the fact that A placed it there, to the fact of his ownership of the animal. The latter step of inference is the vital one; it is perhaps not less natural than the former, but it is more serious in its effect. It would seem that the latter step of inference has been rarely conceded by courts, as a matter of common law; though the former step was universally conceded, it was said that the presence of A's brand was evidence of identity (i. e. of the animal being one of those originally branded by A), but not of ownership."

2. The statute of 1915 goes further than the previous legislation and prohibits the use of an unrecorded brand to prove either the ownership or the identity of a branded animal. The statute regulating brands does not, however, attempt to make recorded brands the only evidence by which ownership or identity can be proved nor does it attempt to make a recorded brand conclusive evidence of ownership. If the statute attempted to make a recorded brand conclusive evidence of ownership or identity; or if it pretended to make recorded brands the exclusive method of proving ownership or identity, then the legislation would be assailable; but the existence of the brand law does not prevent other methods of proof and, although Randolph could not offer evidence of the Grigsby brand, he could offer any other evidence that he might have tending to show that Mayfield did not own the animal.

Sections 3 and 8 of Chapter 33, Laws 1915, were evidently copied word for word from Sections 5 and 14 of a statute enacted in 1905 in Idaho: 1905 Session Laws of Idaho, 352. There was a brand law in Idaho prior to 1905 just as there was a brand law in Oregon prior to 1915; and, in a case analogous in all its essential features to the instant action, the ruling of the court there was adverse to every contention made by the defendant here concerning the validity and effect of the provisions of Chapter 33, Laws 1915: *State* v. *Dunn,* 13 Idaho, 9 (88 Pac. 235). The present statute does not deprive Randolph of the right to prove that Mayfield did not own the animal, for, as said by the court in *State* v. *Dunn,* 13 Idaho, 9 (88 Pac. 235),

"it is no more difficult now than it ever has been to prove ownership in an unbranded animal, and this statute puts the owner of an animal branded with an unrecorded brand in the same position with reference to proof of its ownership as if it had no brand on it at all."

No additional force is given to the contention of the defendant when it is argued that the act of 1915 changes prior rules of evidence. The state has the power to alter rules of evidence. Stated in general terms, the accepted rule is that a person does not have a vested right in a rule of evidence; and, therefore, the legislature has power to alter or create any rule of evidence so long as it leaves a party a fair opportunity to establish his case or defense, and give in evidence all the facts legitimately bearing on the issues in the cause: *Strode* v. *Washer,* 17 Or. 50, 59 (16 Pac. 926); *Boise Irr. etc. Co.* v. *Stewart,* 10 Idaho, 38, 58 (77 Pac. 25, 321); 10 R. C. L. 863; *Auburn* v. *Merchant,* 103 N. Y. 143 (8 N. E. 484, 57 Am. Rep. 705); *State* v.

Beach, 147 Ind. 74 (43 N. E. 949, 46 N. E. 145, 36 L. R. A. 179); 6 R. C. L. 462.

The power of the legislature to alter rules of evidence is discussed in 1 Wigmore on Ev., Section 7, where the author says:

"There can be no vested right in a rule of evidence. Those rules are merely methods for ascertaining facts. It must be supposed that a change of the law merely makes it more likely that the fact will be truly ascertained,—either by admitting evidence whose former suppression, or by suppressing evidence whose former admission, helped to conceal the truth. In either case no fact has been taken away from the party; it is merely that good evidence has been given the one, or bad evidence been taken from the other. In any event, the ascertainment of the truth cannot be supposed to depend on a particular piece of evidence."

In 5 Wigmore on Ev. supplement index (2 ed.), page 4, the case of *State* v. *Dunn,* 13 Idaho, 9 (88 Pac. 235), is cited to strengthen Vol. 1, Section 7.

It is true that prior to 1915, Grigsby had a right to use the HU brand but it is also true that prior to the first legislation on the subject all persons had the right to use the brand. If the first statute was valid the second must be lawful, because there is no difference in principle. The first statute prohibited proof of ownership by an unrecorded brand and the last enactment prohibited the use of an unrecorded brand to prove either ownership or identity. If the first statute was valid then the second is likewise effective because in principle it is not different from the first legislation. A painstaking search has failed to discover a single precedent holding that the state cannot prohibit the use of an unrecorded brand to prove ownership; and if it be conceded that this character of legislation is unassailable, then it cannot be successfully contended

that the same legislative authority cannot prohibit proof of identity by an unrecorded brand. Whether viewed in the light of well-established general rules or measured by the standard fixed by precedents, the rules of evidence found in the act of 1915 are valid and enforceable. It was not error to receive a certified copy of the Mayfield certificate nor was it error to refuse to receive evidence relating to the Grigsby brand.

3. The state relied upon circumstantial evidence for the conviction of the defendant; and the most important item of circumstantial evidence submitted by the prosecution was the hide, together with the fact that it was in the possession of Randolph. The court charged the jury with reference to circumstantial evidence and while the defendant does not object to the instruction given, he does complain because of a refusal to give several lengthy requested instructions. Possibly it would have aided the jury if the concise instruction given by the court had been amplified; but, if the instruction given can be criticised for its brevity, those requested, besides some errors in them, have the fault of being lengthy and redundant and their very prolixity would have confused rather than instructed the jury.

The court refused a request to charge the jury concerning the possession of stolen property, although the defendant requested an instruction upon that subject. The requested instruction might be criticised because it used the words "is a circumstance tending to prove guilt" and yet neither party could complain if the court had employed the quoted language because it was invited by the defendant and did not prejudice the contention of the prosecution; and, therefore, the court should have given the requested instruction or one informing the jury of the rules concerning posses-

sion of stolen property. The refusal to instruct, concerning the possession of stolen property, was prejudicial error, especially since the state asked for a conviction on circumstantial evidence and the defendant had offered evidence which he claimed tended to explain the possession: 25 Cyc. 150, 151.

On the whole, the charge to the jury was a plain, concise and understandable statement of the rules governing the jury and, with the single exception mentioned, the instructions requested by the defendant were either given in substance or properly refused because not correctly stating the law. It is not necessary to notice any of the remaining assignments of error since the questions presented by them are not likely to recur upon a second trial. For the error mentioned the judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Motion to dismiss appeal allowed October 27, 1916.
Rehearing on motion to dismiss appeal argued July 10, opinion dismissing appeal sustained July 17, 1917.

PURDY *v.* WINTERS' ESTATE.

(159 Pac. 1091; 166 Pac. 536.)

ON REHEARING.

Appeal and Error—Decisions Reviewable—Order Relating to New Trial.

1. Where a final decree was entered dismissing a suit with prejudice, a motion subsequently filed to set aside such decree and asking for an order changing venue, amounted to a motion for a new trial, and an order denying such motion was not appealable, and motion to dismiss an appeal therefrom will be sustained.

From Multnomah: HENRY E. MCGINN, Judge.

On motion to dismiss appeal. Motion allowed. Appeal dismissed.

Mr. Cicero M. Idleman and *Mr. John P. Winter,* for the motion.

Mr. Will E. Purdy, propria persona, contra.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a motion to dismiss an appeal. A judgment in a former action between these parties, rendered in favor of the defendants, was affirmed on appeal: *Purdy* v. *Winters' Estate,* 79 Or. 614 (156 Pac. 285). When the mandate went down the plaintiff commenced another action wherein the complaint set forth substantially the charges made in the former action. A demurrer to the complaint herein was sustained and the action dismissed without prejudice, from which latter judgment the plaintiff again appeals. Believing that the questions here involved have been fully litigated and finally determined by this court, the appeal should be dismissed and it is so ordered. DISMISSED.

Former opinion sustained on rehearing July 17, 1917.

ON REHEARING.

(166 Pac. 536.)

Appeal dismissed October 27, 1916. Rehearing allowed on motion to dismiss appeal. Former opinion sustained on rehearing. APPEAL DISMISSED.

Mr. J. P. Winters and *Mr. C. M. Idleman,* for the motion.

Mr. Will E. Purdy, propria persona, contra.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

1. After the death of H. D. Winters which occurred on June 20, 1911, W. E. Purdy claimed to be the owner of certain lands owned by Winters in his lifetime. Purdy based his claim upon an instrument which he asserted was a deed that Winters had made and delivered to him on May 1, 1909. This instrument has been the subject of litigation in one suit, and it has been a theme for discussion in two actions prior to the instant proceeding. In *Butts* v. *Purdy,* 63 Or. 150 (125 Pac. 313, 127 Pac. 25), this court affirmed the Circuit Court and held that the alleged deed was fraudulent and void. In *State* v. *Butts,* 78 Or. 173 (151 Pac. 722), an escheat proceeding in which Purdy asserted ownership in reliance upon the alleged deed, a jury rendered a verdict adverse to Purdy; and it may be noted in passing that this court speaking through Mr. Justice BEAN suggested that:

"The real purpose of the defendant Purdy appears to have been to obtain a new trial of the issues in the case of *Butts* v. *Purdy,* 63 Or. 150 (125 Pac. 313, 127 Pac. 25), which have been heretofore carefully and thoroughly considered and adjudicated."

In *Purdy* v. *Winters' Estate,* 79 Or. 614 (156 Pac. 285), we affirmed a judgment of the Circuit Court sustaining demurrers to the complaint in an action for damages brought by Purdy against the estate of H. D. Winters, deceased, and others; and Mr. Justice BENSON speaking for the court declared that the proceeding was clearly an attack upon the decree rendered in *Butts* v. *Purdy,* 63 Or. 150 (125 Pac. 313, 127 Pac. 25). W. E. Purdy appeared in this suit as a litigant and for the fourth time he avers that he is the owner of the land, and again he attempts to support his claim of owner-

ship by relying on the alleged deed. Purdy began this suit on April 1, 1916, by filing a complaint praying that the alleged deed from H. D. Winters, deceased, be declared a valid deed; that Purdy be declared to be the owner of the property; and that the administratrix be restrained from interfering with Purdy, and that she account for the rents and profits received by her. On May 17, 1916, the Circuit Court dismissed the suit and entered the following decree:

"It appearing to the court from the complaint in this case that the charges made by Will E. Purdy against the defendants herein and others are but variations of charges which he has formerly made against others, which charges the supreme court of the state of Oregon has said was an attempt to alter the decision of the supreme court of Oregon in the case of Will E. Purdy v. Estate of H. D. Winters, Deceased, Agnes Butts (now Agnes Hecker), as administratrix of the estate of H. D. Winters, deceased, C. M. Idleman and Agnes Hecker, formerly Agnes Butts;

"IT IS THEREFORE ORDERED, to the end that the record may be purged, that the case be and the same is hereby dismissed with prejudice."

On June 1, 1916, Purdy filed a motion which reads thus:

"Comes now the plaintiff, Will E. Purdy, and makes application for an order of this court setting aside a former order of Judge Henry E. McGinn in the dismissing of the above named suit. Plaintiff further asks for an order of the court changing the place of trial of the issues between the above named plaintiff and defendants to some other county and state."

Subsequently on June 28, 1916, the motion was denied and an order entered in the journal as follows:

"Now, at this time, this cause came on for argument upon the motion of said plaintiff to set aside a former order of the court dismissing the above action and also

an order for a change of venue, plaintiff appearing in his own proper person and on his own behalf, and after the court had read the said motion, and being sufficiently advised in the premises, the court denied said motion; and the plaintiff electing to stand on his said complaint and refusing to plead further;

"IT IS ORDERED, That this action be, and the same stands dismissed, and that defendants do have and recover of and from the plaintiff their costs and disbursements in this action allowed and taxed at $——, and that execution issue therefor.

"And the said plaintiff here and now gives notice of an appeal from the aforesaid judgment to the supreme court of the state of Oregon."

After the plaintiff filed a transcript, abstract of record and a printed brief, we dismissed the appeal on the motion of defendants: *Purdy* v. *Winters' Estate, ante,* p. 188 (159 Pac. 1091). Upon the petition of plaintiff, however, a rehearing was granted; and the question now presented arises on the motion of defendants to dismiss the appeal. The defendants contend that the order entered on June 28, 1916, is not an appealable order and that the only appealable order appearing in the record is the decree of dismissal which was rendered on May 17, 1916. The plaintiff argues that the order dated June 28, 1916, was an appealable order within the contemplation of the statute.

It will be observed that by the express terms of the order made on May 17, 1916, the case is "dismissed with prejudice"; and, manifestly, this is a decree of dismissal. It is a finality and is the end of the proceeding, unless it is made inoperative by a subsequent order setting it aside. A motion was made to set aside the decree of dismissal, but that motion was never allowed, and therefore the decree of dismissal was never rendered inoperative. By the act of filing the motion the plaintiff admitted the efficacy of the

decree of dismissal and recognized the fact that the decree of dismissal would continue to be a finality and an end of the suit unless the decree was set aside. The motion to vacate the decree was only heard; it was never allowed; and, consequently, the decree itself continued without interruption to be what it always had been,—a decree of dismissal. It is true that after reciting that the cause came on to be heard upon the motion to set aside the decree "dismissing the above action" the order of June 28th continues by reciting "that this action be and the same stands dismissed." A recital that a proceeding be and stands dismissed adds nothing to a previous decree of dismissal. To say that a proceeding is dismissed when it has already been dismissed is a superfluity and amounts to nothing. The motion filed by the plaintiff and acted upon by the court on June 28th, amounted to a motion for a new trial; and the order denying the motion to set aside the decree of dismissal was not an appealable order.

We cannot at this time consider the question as to whether the court was warranted in dismissing the suit. The only question for determination now is whether the plaintiff has appealed from an appealable order. He did not appeal from the decree of dismissal rendered on May 17th, which is the only appealable order appearing in the record; and since he did not appeal from that order, the motion to dismiss this appeal must be sustained. An unbroken line of authorities sustain this conclusion and to deny the motion to dismiss this appeal would be to ignore every precedent where the court has spoken upon the subject: *Stark* v. *Epler,* 59 Or. 262, 268 (117 Pac. 276); *Macartney* v. *Shipherd,* 60 Or. 133, 135, 140 (117 Pac. 814, Ann. Cas. 1913D, 1257); *Gearin* v. *Portland R. L.*

& P. Co., 62 Or. 162 (124 Pac. 256); *Davidson* v. *Almeda Mines Co.*, 71 Or. 516, 517 (142 Pac. 778). The motion to dismiss the appeal is allowed.

FORMER OPINION SUSTAINED. APPEAL DISMISSED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BEAN not sitting.

Argued July 10, reversed and remanded July 17, 1917.

TABOR *v.* COIN MACHINE MFG. CO.*

(166 Pac. 529.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statute.

1. In actions for personal injuries coming within the scope of the Employers' Liability Act (Laws 1911, p. 16), the doctrine of assumption of risk by the employee is abrogated.

[As to assumption of risk under Federal Employers' Liability Act, see note in **Ann. Cas.** 1915B, 481.]

Trial—Instructions—Contributory Negligence.

2. In an action for injuries by operator of a punch-press, in view of Employers' Liability Act, declaring that the contributory negligence shall not be a defense, but may be considered by the jury in fixing damages, instruction that contributory negligence should not be considered by the jury was erroneous.

Master and Servant—Contributory Negligence—Pleading.

3. In employee's action for injuries, the answer pleading that the injury was caused solely by the negligence of plaintiff, although not admitting dereliction upon the part of employer, was sufficient to raise the question of contributory negligence.

Master and Servant—Injuries to Servant—Failure to Warn—Instruction.

4. Where the employee in an action for injuries alleged that punch-press was defective in that it would "repeat," the court correctly submitted question of failure of employer to warn as to dangerous character of machine, although the evidence showed that plaintiff had been warned of the dangerous nature of the work.

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*As to duty of master to instruct and warn his servants as to the perils of the employment, see comprehensive note in 44 **L. R. A.** 33.
REPORTER.

From Multnomah: GEORGE N. DAVIS, Judge.

Action by H. E. Tabor against the Coin Machine Manufacturing Company, a corporation, to recover damages for an alleged personal injury. From a verdict and judgment in favor of plaintiff, defendant appealed. Reversed and remanded for a new trial.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action for damages for personal injuries alleged to have been received by plaintiff in the course of his employment by reason of the negligence of his employer, the defendant. The substance of the complaint is that plaintiff was engaged in manipulating a certain machine known as a punch-press which was defective in the particular that it would "repeat" or continue the thrusts of the ram when it should have remained at rest. It is alleged that the machine should have been equipped with a guard which would have prevented the injury; that defendant failed to warn plaintiff of the dangerous character of the machine; that defendant neglected to provide plaintiff with a stick or hook with which to remove the pieces from under the ram or punch, and that by reason of these acts of negligence, plaintiff lost a finger and a portion of his thumb.

The answer admits the injury, but denies any negligence upon the part of the defendant, and alleges that the injury was caused solely by the negligence of the plaintiff himself. Upon the trial, there was a verdict and judgment for plaintiff from which defendant appeals. REVERSED AND REMANDED.

For appellant there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Jay Bowerman.*

For respondent there was a brief over the names of *Mr. F. E. Swope* and *Messrs. Davis & Farrell,* with an oral argument by *Mr. Wilfred E. Farrell.*

MR. JUSTICE BENSON delivered the opinion of the court.

The assignments of error present two questions, both based upon instructions given and refused by the trial court. The first of these involves the charge of the court upon the question of contributory negligence. One instruction was in the following language:

"The defendant in the answer denies that it was negligent in any of the respects claimed by the plaintiff, and claims on the contrary that the injury to the plaintiff, if any, was caused by the sole negligence of the plaintiff himself, and without any negligence on the part of the defendant.

"The defendant then sets up what is known in law as the defense of assumption of risk and also the defense of contributory negligence. But these two affirmative defenses, under the view the court takes of the law and the facts in this case, will not be necessary for your consideration of the case. The court holding that the case comes within what is known as the Employers' Liability Act which was passed by the people of this state in 1910. And the court will instruct you simply upon the law as applicable to that act."

The court further instructed the jury as follows:

"As the court has said to you, under the law in this state the question of assumption of risk does not enter into this case. Neither does the question of contributory negligence. And by contributory negligence is meant merely this: that where the negligence of the defendant caused or contributes to cause the injury, and also the plaintiff was negligent and that negligence contributed also to cause the injury, then under old rules of common law the plaintiff would not be en-

titled to recover but that does not apply to this case. And the mere fact of the plaintiff being guilty of negligence is no excuse if the defendant failed to use the precautions required by the act of 1910, which was read to you at the beginning of the instruction by the court."

There are other instructions assigned as error which reiterate the statement that contributory negligence is not to be considered by the jury. There is evidence in the record tending to prove that it was a physical impossibility for the machine to "repeat," as claimed by the plaintiff, and that the accident could not have occurred if the plaintiff had not negligently pressed the treadle with his foot while his hand was under the punch. There was also evidence to the effect that about fifteen minutes before the accident, he was seen lying across the table of the machine while operating it, with his hands within an inch of the ram or punch, and had been warned that it was dangerous. This was certainly evidence of contributory negligence. Section 6 of the act of 1910, reads as follows:

"The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

In the case of *Sonniksen* v. *Hood River Gas & Elec. Co.*, 76 Or. 25, 36 (146 Pac. 980), in construing this section, Mr. Chief Justice MOORE says:

"Though the clause of the act under consideration uses the word 'may,' the jury must apportion the damages occasioned by a loss suffered by an injury to an employee when he and the employer have both been negligent in the manner indicated."

These instructions set out are correct in their statement of law, so far as they refer to assumption of risk, as the act of 1910 has abrogated that defense: *Nelson*

v. *Brown & McCabe,* 81 Or. 472 (159 Pac. 1163). Upon the question of contributory negligence, however, the instructions are erroneous. It is true that the negligence of the plaintiff is not to be considered *as a defense,* but the very sentence of the statute, which so declares, also makes it necessary to consider it in fixing the amount of damage and, without the addition of this element, the instruction does not correctly state the law.

The instruction requested by defendant to the effect that "if the jury find that the negligence of the plaintiff contributed to the injury they should then take that fact into consideration in arriving at their verdict," is subject to the same criticism in that it does not state the purpose for which the jury may consider such evidence.

It is urged that since the answer pleads that the injury was caused solely by the negligence of the plaintiff, and does not admit any dereliction upon the part of defendant, there is no plea of contributory negligence; and, therefore, no justification for instructions upon that subject. This contention is without merit as this court has held that a plea that plaintiff was negligent is sufficient to raise the question of contributory negligence: *Edlefson* v. *Portland Ry., L. & P. Co.,* 69 Or. 18, 25 (136 Pac. 832); *Susznik* v. *Alger Logging Co.,* 76 Or. 189 (147 Pac. 922). Defendant also urges that the court erred in submitting to the jury the question of a failure by the defendant to warn plaintiff as to the dangerous character of the machine. This assignment is based upon the contention that the undisputed evidence discloses that plaintiff was warned of the dangerous nature of the work, and that there was no evidence upon which to base any instruction. This point is not well taken

since the plaintiff's complaint describes the dangerous element of the machinery as consisting of its tendency to "repeat" when the treadle was released; the evidence does not disclose that any such warning was given, and the defendant insisted that "repeating" was a mechanical impossibility.

For the error mentioned, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE and MR. JUSTICE BURNETT concur.

MR. JUSTICE HARRIS concurs in the result.

Argued July 6, affirmed July 19, 1917.

RANEY *v.* STATE INDUSTRIAL ACCIDENT COMMISSION.

(166 Pac. 523.)

Master and Servant—Workmen's Compensation—Award of Commission—Review.

1. The State Industrial Accident Commission not being a judicial tribunal, a re-examination of any of its final determinations by a Circuit Court is inaugurated by procedure in the nature of a writ of review, and when jurisdiction of the cause has thus been secured, it is to be tried *de novo* as upon an appeal.

Master and Servant—Workmen's Compensation—Award of Commission—Review.

2. Where a petition to review a refusal to award compensation is tried without a jury, the only question involved is whether the findings of fact as made by the court when supported by any evidence uphold the judgment rendered.

Master and Servant—Workmen's Compensation—Who Liable.

3. Where a person engaged in farming operates for himself or others any machine or agency that brings such employer automatically within the hazardous occupations, unless he has given in the manner prescribed notice that he will not be governed by the provisions of

the act, he is not immune from making to the State Industrial Accident Commission the small contributions which the law exacts from the product of business of that kind in order to create a fund as a partial compensation to the laborers who have been injured by such means.

Master and Servant—Workmen's Compensation—Who Liable—"Hazardous Occupation."

4. Under Workmen's Compensation Act (Laws 1913, p. 192), Section 13, including mills within hazardous occupations, and Section 14, providing that "mill" means any plant, premises, room, or place where machinery is used, any process of machinery, changing, altering, or repairing any article or commodity for sale or otherwise, together with the yards and premises which are part of the plant, including elevators, warehouses, and bunkers, one employed by a farmer working on a silo-mill is engaged in a "hazardous occupation."

[As to meaning of "plant" as used in Workmen's Compensation Act, see note in **Ann. Cas.** 1917A, 323.]

Master and Servant—Workmen's Compensation—Who Liable—Hazardous Occupation.

5. The fact that the operation of an ensilage cutter may have been merely incidental to farming in which the employer was generally engaged did not make the management of the mill a less "hazardous occupation."

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is a proceeding by Wesley Raney against the State Industrial Accident Commission and Wm. A. Marshall, Harvey Beckwith, and Carl Abrams, the members thereof, to review their action in refusing to award to the plaintiff any compensation for the loss, by accident, of his left hand. From the record of the cause as made the trial court found, in effect, that at all the times stated the State Industrial Accident Commission was duly created by and existed pursuant to the laws of Oregon, and that the other defendants were the regularly appointed, legally qualified, and acting commissioners thereof, and, as such, were authorized to perform certain acts of a public nature; that on July 1, 1916, the plaintiff was employed by D. R. Tinnerstet, who then was engaged in cutting for a

dairyman in Tillamook County, Oregon, ensilage by means of a portable mill, the chief mechanism of which consisted of blades fastened to a cylinder, which being rapidly revolved prepared cattle feed for silo purposes; that this machinery was propelled by a belt connected with a ten-horse power gasoline engine, and when in operation the person feeding it was obliged to stand close to the blades against which he pushed the fodder with his hands; that on such day, and while plaintiff was performing the duties for which he was engaged, his hand, by accident, came in contact with the revolving knives, and was torn off at the wrist; that such injury was occasioned by violent and external means and arose out of the course of plaintiff's employment; that at the time of the accident his employer was engaged in one of the hazardous occupations specified by the statute, and he had never notified the defendants that he would not contribute to the industrial accident fund, and with the plaintiff he was subject to the provisions of that act; that within the time prescribed after the accident the plaintiff submitted the attending physician's certificate of injury and made application for the allowance of compensation therefor to the defendants, who rejected his entire claim for indemnity, including a demand for $100 expended for medical attendance and hospital dues; that within the time limited therefor the plaintiff commenced these proceedings to review such action. As conclusions of law deducible from such findings the court further found that in rejecting plaintiff's claim for compensation the defendants failed properly to consider the law and facts pertaining thereto; that the ensilage cutter was a "mill" within the meaning of that term as defined by the statute, and that Tinnerstet was then engaged in a hazard-

ous occupation as thus specified and in all respects was subject to the provisions of the act; that thereunder the plaintiff is entitled, as compensation for the injury sustained, to $25 a month for 76 months, beginning with July 1, 1916, and the further sum of $100 which he had expended for medical attendance, hospital dues, etc.; and that the order of the defendants rejecting the plaintiff's claim be reversed and a judgment entered requiring them to pay the award here made in the manner prescribed by law. A judgment having been entered in accordance therewith the defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Mr. J. A. Benjamin,* Assistant Attorney General, *Mr. George M. Brown,* Attorney General, and *Mr. T. H. Goyne,* District Attorney; with an oral argument by *Mr. Benjamin.*

For respondent there was a brief and an oral argument by *Mr. George P. Winslow.*

MR. JUSTICE MOORE delivered the opinion of the court.

The statute in force when this cause was initiated regulating the transfer of a claim for compensation for an injury received by a servant from the State Industrial Accident Commission to a judicial tribunal declares:

"Any employer, workman, beneficiary, or person feeling aggrieved by any decision of the commission affecting his interests under this act may have the same reviewed by a proceeding in the nature of an appeal and initiated in the circuit court of the county in which the accident occurred, or in which he resides * * and the court shall determine whether the commission has

justly considered all the facts concerning injury, whether it has exceeded the powers granted it by this act, whether it has misconstrued the law and facts applicable to the case decided. * * Upon the hearing of such an appeal the court in its discretion may submit to a jury any question of fact involved in such an appeal. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. No such appeal shall be entertained unless notice of appeal shall have been served by mail or personally upon some member of the commission within 30 days following the rendition of the decision appealed from and actual communication thereof to the person affected thereby": Gen. Laws Or. 1913, Chap. 112, § 32.

1, 2. The State Industrial Accident Commission not being a judicial tribunal, a re-examination of any of its final determinations by a Circuit Court is inaugurated by procedure in the nature of a writ of review. When jurisdiction of the cause has thus been secured, it is to be tried *de novo* as upon an appeal, where the facts involved may be considered and determined by a jury in the discretion of the court, thus showing that evidence may be given at such hearing. The case at bar was tried on appeal without the intervention of a jury, and hence the only question involved is whether the findings of fact as made by the court when supported by any evidence uphold the judgment rendered, which must conform to the provisions of the statute governing such a case: Annotation—Workmen's Compensation, L. R. A. 1916A, 266. At page 271 of this volume in referring to the law regulating the practice in a case of this kind it is observed:

"In general it may be said that the statutes have attempted to provide for a procedure that is simple, flexible, and speedy."

3, 4. The reason assigned by defendants for rejecting plaintiff's claim for compensation for the injury sustained by the accident is that the business in which he was engaged at the time he was hurt is incidentally connected with farming, which is an occupation not included within the hazards specified in the act under consideration. Farming is not treated in the statute as a hazardous occupation, and since the performance of agricultural work does not involve much danger of accident to life or limb, the legislative assembly omitted that class of industry from the catalogue. Where, however, a person engaged in farming operates for himself or others any machine or agency that the statute has declared brings such employer automatically within the hazardous occupations, unless he has given in the manner prescribed notice that he will not be governed by the provisions of the act, he is not immune from making to the State Industrial Accident Commission the small contributions which the law exacts from the product of business of that kind in order to create a fund as a partial compensation to the laborers who have been injured by such means. Section 13 of the act in question includes mills within the hazardous occupations to which the statute applies. Section 14 thereof as far as involved herein reads:

"In the sense of this act words employed mean as here stated, to-wit: * * Mill means any plant, premises, room, or place where machinery is used, any process of machinery, changing, altering, or repairing any article or commodity for sale or otherwise, together with the yards and premises which are part of the plant, including elevators, warehouses, and bunkers."

Section 19 of the act originally provided that all employers engaged in operating "cereal mills" should be included within class A. This section was amended

so as to prescribe the rate of contribution to be made to the State Industrial Accident Commission by employers who operated "flour, grain, chop, and feed mills": Gen. Laws Or. 1915, Chap. 271. A text-writer in speaking of the Workmen's Compensation Act observes:

"Being remedial in character, the act should receive a broad and liberal interpretation so as to effectuate its beneficent purpose": 5 Sutherland, Dam. (4 ed.), § 1360, p. 5146. To the same effect see also Annotation—Workmen's Compensation, L. R. A. 1916A, 215, and cases cited in note 45.

Giving such enlarged construction to the phrase "feed-mills" as referred to, it is believed the term so designated is broad enough reasonably to include an ensilage cutter as described by the trial court in its findings. This machine was used to cut feed which was stored in a silo to furnish nourishment to cows that were kept for dairy purposes, and hence the instrument was a "feed-mill" within the express provisions of the statute and automatically rendered the operation of such machinery a hazardous occupation as specified in Section 13 of the act.

5. The fact that the operation of an ensilage cutter may have been merely incidental to farming, the business in which plaintiff's employer, D. R. Tinnerstet, was generally engaged, did not make the management of the "feed-mill" a less hazardous occupation: 5 Sutherland, Dam. (5 ed.), § 1376, p. 5185; *Wendt* v. *Industrial Ins. Com. of Washington,* 80 Wash. 111 (141 Pac. 311, 5 N. C. C. A. 790); *State* v. *Business Property Security Co.,* 87 Wash. 613 (152 Pac. 334).

The amount awarded by the court to the plaintiff as part compensation for the loss of his hand is the

exact sum prescribed by the act: Section 21, subd. 4 (f).

It follows that the judgment should be affirmed, and it is so ordered. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Motion to dismiss allowed July 3, rehearing denied July 24, 1917.

SOUTHWESTERN SURETY INSURANCE COMPANY *v.* FOSTER.

(165 Pac. 1176.)

Appeal and Error—Notice of Appeal—Necessary Party.

1. In suit by surety on contractor's bond to determine to whom it should pay, where judgment was rendered against the surety, and against one of the contractors and the administrator of the other contractor, the administrator was a necessary party on appeal by written notice under Section 550, L. O. L., as amended by Laws of 1913, page 617; the judgment debtors presumably having the right of contribution.

From Multnomah: JOHN P. KAVANAUGH, Judge.

On motion to dismiss appeal. The facts upon which the motion to dismiss the appeal is based are set forth in the opinion of the court. Motion allowed and appeal dismissed.

Messrs. Fulton & Bowerman, Mr. Horace B. Nicholas and *Mr. Newton McCoy,* for the motion.

Mr. Chester V. Dolph, for plaintiff-respondent.

Mr. James E. Craib, Mr. Thomas A. Hayes and *Mr. Andrew G. Thompson,* for Appellant.

In Banc. Opinion PER CURIAM.

William Foster and C. A. Bartz, composing a firm doing business as Foster & Company, engaged to build a schoolhouse for School District No. 1 of Multnomah County, Oregon. The Southwestern Surety Insurance Company, the plaintiff here, underwrote the bond required of the contractors by the statute. Various creditors of the firm instituted actions against it and garnished the money due it from the school district, about which time the partnership abandoned the work. Actions were then commenced in the name of the school district against the plaintiff here for the benefit of sundry persons furnishing labor and materials used in the structure. At this juncture the plaintiff surety company began this suit against the contractors, the school district, and the beneficiaries of the litigation mentioned, in order to ascertain what was due to each so that its liability on its undertaking for Foster & Company could be definitely determined. After a hearing the court rendered a decree for the district for the recovery of a certain amount of money from the plaintiff and the defendants, Foster and the administrator of Bartz who had died *pendente lite,* and further providing to the effect that all the tools, implements, and supplies left by the contractors in the possession of the school district should be delivered to the plaintiff to be sold by it and applied to its demands against its principals, the contractors, and that should there be any surplus of $1,700 retained by the school district to satisfy the attachments and garnishments after applying it to that purpose the same should be paid to the surety company. A notice of appeal on behalf of the defendant Foster was filed containing an admission of service by the attorney for

the school district and having appended thereto this writing:

"State of Oregon,
County of Multnomah,—ss.

"I, Thomas A. Hayes, do hereby certify that I am one of the attorneys for appellant, William Foster; that I served the within notice of appeal on Chester V. Dolph, attorney for plaintiff, Southwestern Surety Insurance Company, this 4th day of October, 1916; that said Chester V. Dolph refused to accept service of said notice of appeal, by signing acceptance.

"(Signed) THOMAS A. HAYES."

1. The school district now moves to dismiss the appeal, *inter alia,* "for the further reason that G. S. Breitling, administrator of C. A. Bartz, deceased, did not join in the appeal herein and no notice of appeal was served on said administrator." The decree being against the plaintiff, the defendant Foster and the administrator of Bartz, presumably the right of contribution would exist between the partners. The Bartz estate being liable for the payment of the decree the administrator would be interested in retaining the right to compel Foster to pay his part of the established liability. If, however, the latter succeeded in overturning the decree or modifying it in some particular as to himself it would remain a charge against the surety and the estate who have not appealed with the right of contribution gone.

This subject was treated by Mr. Justice BEAN in *Templeton* v. *Morrison,* 66 Or. 493 (131 Pac. 319, 135 Pac. 95), wherein he concludes that a person jointly liable with the appellant is an adverse party upon whom notice of appeal must be served. Where written notice of appeal is adopted as the means of bringing a case before this court for review the statute

requires it to be served upon all adverse parties who have appeared in the action or suit: Laws 1913, Chap. 319, amending Section 550, L. O. L. In the present instance there was quite as much reason to serve notice upon the administrator as upon the plaintiff because the estate was equally bound by the decree. It is unnecessary to consider the other reasons upon which the motion is grounded. On the authority of *Templeton* v. *Morrison,* 66 Or. 493 (131 Pac. 319, 135 Pac. 95), therefore, the appeal must be dismissed.

DISMISSED. REHEARING DENIED.

Submitted on briefs June 19, affirmed July 3, rehearing denied July 24, 1917.

GONG *v.* TOY.*

(166 Pac. 50.)

Partnership—Requisites.

1. A partnership for the purpose of raising a crop of hops does not exist between two men where one of them has exclusive authority to sell the crop, the principal property of the concern.

[As to mutual agency as necessary condition to a partnership, see note in 115 **Am. St. Rep.** 413.]

Master and Servant—Pleading—Variance.

2. In an action to recover a fixed sum per month as wages for services as a farm laborer in raising hops, plaintiff must prove contract as alleged, and cannot recover where it appears that he was to be paid for his labor only out of the proceeds of the crop.

From Marion: WILLIAM GALLOWAY, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

Toy brought an action against Gong to recover wages at $75 a month for services during a period of

*Generally on the question of effect of agreement to share profits to create a partnership, see comprehensive note on the different phases of the question in 18 **L. R. A. (N. S.)** 963. REPORTER.

eight months and eighteen days as a farm laborer in raising hops. Gong, claiming that they were partners in the business, brought this cross-bill in equity alleging in substance that he had a lease from the owner of the hopyard dated February 26, 1915; that afterwards he entered into an agreement of partnership with the defendant whereby Gong was to furnish all the money necessary to cultivate and harvest the crop grown on the premises for the year 1915; Toy to furnish the labor in cultivating and curing the crop: the portion of hops coming to the plaintiff under the lease with the original landlord to be sold by the plaintiff from the proceeds of which the expenses were to be paid; plaintiff to be reimbursed for his advances and the remainder divided between both parties, share and share alike; and the losses to be borne by each party equally if the venture proved unsuccessful. He alleges that the crop was unprofitable to the extent of about $700; that no account has been made by the defendant; that he refused to settle and that the services rendered by Toy to the partnership are the very ones described in his action. Contending that he has no plain, complete, or adequate remedy at law, Gong prays for a decree dissolving the partnership and for an accounting.

The answer merely traverses the cross-bill. The Circuit Court found that there was no partnership and dismissed the bill, and Gong appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Smith & Shields* and *Mr. Walter C. Winslow.*

For respondent there was a brief over the name of *Messrs. Carson & Brown.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The plaintiff and his son testified to a partnership between the present litigants. There were six Americans who gave evidence of various transactions wherein Gong and Toy acted together as partners. These six witnesses also related instances in which Toy said he was a partner with Gong in the operation of the hop-yard. Opposed to this is the denial of Toy together with the statement of two Caucasian witnesses who declared that Gong said Toy was working for him. Gong, however, admits that he had the control of the sale of the hops and that Toy had no authority for that purpose. The rule is thus laid down in 30 Cyc., p. 446:

"In the absence of any special stipulation between the partners on the subject, every partner is entitled to take part in the management of the business; and in case of difference of opinion as to such management, the majority govern. These rules may be modified, however, by the partnership contract, or by the subsequent agreement or conduct of the partners. Thus the control of one part of the business may be committed to one member of the firm, while that of a different part is turned over to another partner. It may be stipulated, too, that in case of difference of opinion the decision of a single partner may be final":

Haller v. *Willamowicz,* 23 Ark. 566; *McAlpine* v. *Millen,* 104 Minn. 289 (116 N. W. 583); *Thomas* v. *Hardsocg,* 137 Iowa, 597 (115 N. W. 210); *Morgan* v. *Child* (Utah), 155 Pac. 451. It would seem that two individuals may contract to place their money, effects, labor, and skill, or some or all of them, in a lawful concern or business and to divide the profits and bear the loss in certain proportion which would constitute a partnership within the meaning of *Cogswell* v. *Wil-*

son, 11 Or. 371 (4 Pac. 1130). Further, it is not apparent why as between themselves they could not lawfully contract that each should have control of certain parts of the business of the concern to the exclusion of the other partner, there being nothing unlawful in such a convention. However, the case of *Hanthorn* v. *Quinn,* 42 Or. 1 (69 Pac. 817), controls the present suit on the doctrine of *stare decisis,* for it is there held in substance that a partnership does not exist between partners associated in a common undertaking unless each one has the right to manage the whole business and to dispose of the entire property involved in the enterprise for its purpose in the same manner and with the same power as all can when acting together. It being admitted by Gong that he alone had the authority to sell the crop, the principal property of the concern, and that Toy had no right to dispose of it brings the instant case within the doctrine of *Hanthorn* v. *Quinn,* 42 Or. 1 (69 Pac. 817), which must control us.

2. There are decisions, however, which hold that the compensation of an employee may be made to depend upon the venture being successful so that payment for his services shall be made only out of net profits. If such was the arrangement between these parties, Gong has a plain, speedy, and adequate remedy at law. If Toy would recover a certain salary a month or the *quantum meruit* for his services, he must prevail in accordance with the allegation of his complaint or not at all. If the contract between the parties was a partnership, or to the effect that he was to be paid only out of the net proceeds it would be enough to defeat his law action as laid if properly pleaded in defense, because such an agreement would not correspond with the averments of his complaint. An accounting in equity is necessary only to settle a true partnership.

On the authority of *Hanthorn* v. *Quinn*, the decree of the Circuit Court is affirmed without costs to either party. AFFIRMED.

Argued September 14, reversed November 28, application for supplemental opinion denied December 27, 1916.
Rehearing denied February 13, 1917.

FARRELL *v.* DAVIS.*

(161 Pac. 94, 713.)

Corporations—Issue of Stock—Statute—"Actual Fraud"—"Property."

1. Under Section 6696, L. O. L., providing that in the absence of actual fraud the judgment of the directors of a corporation as to the value of property for which they issue stock shall be conclusive, "actual or positive fraud" consisting in circumventing, cheating or deceiving a person, to his injury, by any cunning, deception, or artifice, and a contract right being a chose in action, and therefore "property," where directors issued stock for an exclusive right to market the products of another corporation for a term of years, which all concerned believed to be a valuable contract, the fact that the contract turned out to be of little or no value, not being sufficient to show fraud on the part of the directors, their judgment will not be revised, or a subsequent purchaser of the stock be held liable as for unpaid subscriptions.

[As to liability of directors of corporation for misrepresenting its solvency, see note in 8 **Am. St. Rep.** 604.]

Corporations—Stock Issued at Overvaluation—Right of Creditor.

2. As a general rule, a corporate creditor cannot complain where, at the time he contracted with the company, he knew the stock had been issued for property taken at an overvaluation.

APPLICATION FOR SUPPLEMENTAL OPINION.

Appeal and Error—Question for Review.

3. On appeal in suit to recover unpaid stock subscriptions, wherein defendant pleaded a decree of the Circuit Court allowing his claim against the insolvent corporation, where the decree of the circuit judge in the suit modifying and disregarding the findings of the circuit judge allowing the claim will be reversed and the suit dismissed, as prayed in defendant's answer, it is unnecessary to pass on defendant's claim against the corporation.

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*For authorities on the question of effect of creditor's knowledge that stock was improperly issued on overvaluation of property, or improperly issued as paid up, see note in 8 **L. R. A. (N. S.)** 271.
REPORTER.

From Multnomah: ROBERT G. MORROW, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This suit is brought by W. E. Farrell, as assignee of the Hygienic Mattress Company, against A. E. Davis, H. H. McCarthy, R. E. Norton, G. A. Emery and S. B. Hendee, to recover from them as stockholders in the insolvent Mattress Company for alleged unpaid stock subscriptions. From a decree against defendant A. E. Davis for the sum of $8,945.88, he appeals.

It is alleged in the complaint that defendants H. H. McCarthy and R. E. Norton are not within the jurisdiction of the courts of Oregon. The suit was dismissed as to G. A. Emery as not commenced within the time limited by the Code. Plaintiff avers that the issuance of $40,000 of the capital stock of the insolvent corporation to H. H. McCarthy, R. E. Norton and G. A. Emery was without consideration in that no money nor anything else of value ever passed into the treasury of the bankrupt company therefor, and that the present and past holders of this stock should be required to pay to the assignee sufficient money to satisfy the debts of the corporation. The Oregon Pine Needle Fibre Company, a corporation, obtained a patented machine for the manufacture of pine needles into fibre for mattresses. On October 12, 1904, having recently constructed a building in Union County, Oregon, to be used for such manufacturing purposes, it contemplated the installation of additional machinery to be used in the business, which was somewhat in its infancy, and in order to pave the way to interest capital in the enterprise to a sufficient extent to better insure the success of the undertaking, entered into a contract with Dr. M. W. Bruner and H. H. McCarthy according to the terms of which the latter men agreed to buy and were

given the exclusive right to market the products of the Fibre Company outside of a local radius of 100 miles for the term of five years from that date with the privilege of extending the contract for an additional five years if desired by the purchasers. The contract net price agreed to be paid for the fibre was ten cents a pound, and $4 a pound; apothecary's weight, for all pine-needle oil. The price of the insect powder was to be decided upon thereafter. These prices were to be for goods delivered at Chicago or St. Louis and at all points in the United States west thereof, the fibre to be delivered in car lots of a minimum weight of 20,000 pounds, and the freight to be paid by Bruner and McCarthy and deducted from the purchase price. It was mutually agreed that in case the Pine Needle Company should build other factories for the manufacture of pine-needle products during the continuance of the contract the other parties should have the option of taking the entire product under the same terms. In December, 1904, the Hygienic Mattress Company was organized for the sole purpose of taking over this contract from the individuals then interested in it, and manufacturing and marketing the products of the Fibre Company. The Mattress Company was organized with 500 shares of stock each having a par value of $100. Mr. A. E. Davis, the defendant-appellant, took 100 shares for which he paid $10,000 in cash. Ninety-eight of these shares were issued to Davis and one each to A. E. Gebhardt and J. C. Flanders for the purpose of qualifying them as directors of the Mattress Company. The other 400 shares were issued to the defendants McCarthy, Emery and Norton in exchange for their rights under the contract with the Oregon Pine Needle Fibre Company. This latter company ratified the transfer to the Hygienic Mattress Company and agreed

to accept this corporation as a substitute for the individuals on the contract. Davis, McCarthy, Norton, Gebhardt and Flanders were elected directors of the Mattress Company. Davis was elected president and manager at a salary of $500 a month and resigned his position in the Portland Flouring Mills, where he was next to the head of the concern, to engage in the pine-needle fibre business. McCarthy was chosen vice-president, and Norton, secretary. An assessment of 100 per cent was levied upon the stock subscriptions and an agreement made by which McCarthy's shares for $10,000, and those of Norton for $20,000 were declared to be fully paid by the transfer of the contract. Subsequently Davis purchased the 100 shares of stock held by Norton for which he paid $10,000 in cash. These 200 shares for which he paid $20,000 cash were Davis' entire personal holdings, but for voting purposes only and as a protection to him he was assigned 51 shares of the 100 owned by McCarthy. The latter assigned to him a block of stock in the Oregon Pine Needle Fibre Company and Davis attended its annual meeting and asked the Fibre Company to take the Mattress Company as party of the second part in the contract of October 12, 1904, instead of Bruner and McCarthy. The Mattress Company continued in business about sixteen months and manufactured a good mattress. In April, 1906, it made an assignment for the benefit of creditors under the state law. On July 9, 1906, the plaintiff was appointed assignee for creditors. Mr. Davis put in a claim of $6,116.40 to the assignee for salary and disbursements made in behalf of the corporation, which was contested by the other creditors and disallowed by the assignee. After a full hearing upon all the evidence it was held by Judge CLELAND of the Circuit Court that Mr. Davis

was entitled to this amount. It appears that this finding was ignored in the present case. The defendant Davis has interposed a plea of *res adjudicata* and has set off a claim for salary against the Mattress Company the amount of which claim is disputed.

REVERSED AND SUIT DISMISSED.

For appellants there was a brief over the names of *Messrs. Wood, Montague & Hunt* and *Mr. Prescott W. Cookingham,* with oral arguments by *Mr. Charles E. S. Wood* and *Mr. Cookingham.*

For respondent there was a brief with oral arguments by *Mr. Turner Oliver* and *Mr. Frank S. Grant.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. This suit was instituted in 1908. The theory of the complaint is that the $40,000 worth of stock issued in exchange for the contract with the Fibre Company was entirely without consideration, for the reason that the contract was not property within the meaning of Section 6696, L. O. L. The suit is defended upon the theory that the stock subscribed was fully paid up by the assignment in good faith to the Mattress Company of a valuable contract right which would be considered as property under the section of the statute referred to which provides as follows:

"All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due, or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser; provided, that any corporation formed under the laws of this state may purchase real or personal property, includ-

ing the stock of any other corporation, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be fully paid stock and not liable to any assessment; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements or reports of the corporation to be published or filed, stock so issued shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact."

All that part of the section commencing with the word "provided" was added thereto by an amendment in 1903. If there was no actual fraud in the transaction of issuing the stock for the contract we are precluded by the legislative mandate from questioning the judgment of the directors of the Mattress Company as to the value of the contract. The evidence shows that the machine for the manufacturing of fibre from pine needles was patented by a man at Grants Pass, Oregon, and that the Oregon Pine Needle Fibre Company had obtained the patent right. There appears to have been but little, if any, question in the minds of all the interested parties at the time but that the manufacturing of the fibre by the Fibre Company and the manufacturing and sale of mattresses by the Mattress Company would be a very profitable business and that the obtainment of the ten years' contract of the fibre plants was a very valuable right. McCarthy was vice-president of the Fibre Company and in connection with Bruner was apparently armed with this chose in action in order to interest other capitalists in the manufacturing of mattresses and thereby make a demand and sale of the output of their factory. About November 5, 1904, Davis was presented with a prospectus showing a detailed statement of the estimated cost of operating and

the profits of the Oregon Pine Needle Fibre Company's plant for a run of ten months taking the prices named in the contract as a basis and leaving a net balance of profit of $91,597.40. Emphasis was placed upon the fact that "this is the only pine-needle fibre machine in the world and the only process in operation" and covered by a patent. For the company to be organized for manufacturing the fibre into mattresses and selling the products, oil, etc., an estimate was made of the cost and selling price for the same length of time, and after deducting all expenses a net profit was estimated at $140,400. All appear to have had confidence in the success of the venture, to have believed that the advantage of the contract would work out a good profit, and that it was valuable. There was no actual fraud on the part of the directors in estimating the value of the rights obtained under the contract. Defendant Davis proved his good faith in the transaction by putting $10,000 into the treasury of the Mattress Company for a one-fifth interest in the contract right. In order to do this he relinquished an established position with a well known, reliable concern to devote his entire time to promote the success of the enterprise, and later he paid $10,000 more for that amount of the capital stock of the Mattress Company.

Actual or positive fraud has been said to consist in circumventing, cheating, or deceiving a person to his injury, by any cunning, deception or artifice: 20 Cyc. 8. A contract right being a chose in action comes within the legal understanding of property: 32 Cyc. 654. Thus a contractual license to mine, revocable only by consent or condition broken, is property though coupled with an obligation to continue the work, and may be accepted by a corporation in payment of a subscription to its stock: *Shepard* v. *Drake,* 61 Mo. 134. See, also,

Beyrich v. *Liebler,* 3 N. Y. Supp. 293. The same principles govern the payment for stock by a contract right as control the analogous line of cases where stock is paid for by other intangible rights such as patent rights: *Rich* v. *Bank,* 7 Neb. 201.

It is said in 4 Thomp. Corp., Section 3953: "* * * An agreement between the owner of a patent right and a third party that the latter should form a corporation to work the patent and should issue to the former a certain number of full paid shares of the capital stock of the corporation for the transfer of the patent right, there being no evidence of fraud or of a purpose to impose upon the public, has been held a valid agreement."

The fact that it subsequently turned out that this contract had little or no value is not of itself sufficient to show fraud on the part of the directors: *American Tube & Iron Co.* v. *Hayes* (Pa.), 30 Atl. 936; *Young* v. *Erie Iron Co.,* 65 Mich. 111, 122.

S. B. Hendee, a stockholder of the Oregon Pine Needle Fibre Company, appears to have assisted H. H. McCarthy in promoting the enterprise and everything seems to have been done in the interests of that company as well as the Mattress Company. On November 5, 1904, Hendee wrote Davis in part as follows:

"In presenting the within Manufacturing Enterprise, I would respectfully call your attention to the truthfulness of the statements that can be verified and indorsed by your family physician, also the point that the sale of every article assists in retaining as well as restoring to health the purchaser, besides providing the owners of mill and factory a handsome profit."

From all indications these corporations were closely allied and it is not easy to believe that the officers of the Pine Needle Company did not know all about the arrangement as to the issuance of the stock for the con-

tract. In fact the circumstances show that they were aware of this.

2. The claims of the Pine Needle Company for fibre, etc., which have been assigned to an individual constitute the principal part of the indebtedness of the Mattress Company for which this suit is brought. As a general rule, a corporate creditor cannot complain where, at the time when he contracted with the company, he knew that the stock had been issued for property taken at an overvaluation: 1 Cook on Corp., § 46, p. 203, citing *Bank of Fort Madison* v. *Alden,* 129 U. S. 372 (32 L. Ed. 725, 9 Sup. Ct. Rep. 332); *McDowell* v. *Lindsay,* 213 Pa. St. 591 (63 Atl. 130); *Bonet etc. Co.* v. *Central etc. Co.,* 153 Mo. App. 185 (132 S. W. 270); *Davis* v. *Ball,* 64 Wash. 292 (116 Pac. 833, Ann. Cas. 1914B, 750); *Johnson* v. *Tennessee Oil Co.,* 74 N. J. Eq. 32 (69 Atl. 788); *Bank* v. *American etc. Co.,* 69 N. J. Eq. 326 (60 Atl. 54); *Lea* v. *Iron etc. Co.,* 147 Ala. 421 (42 South. 415, 119 Am. St. Rep. 93, 8 L. R. A. (N. S.) 271).

The Oregon Pine Needle Fibre Company, being the father of the whole enterprise and instrumental in interesting Davis to the extent of paying $10,000 to the Mattress Company for stock, and afterwards $10,000 more to McCarthy, the vice-president of the Oregon Pine Needle Fibre Company for his stock in that company, is in a poor position to insist that Davis bear another large share of the burden or to assert that the contract executed by it and sent out into the market to raise funds for the enterprise in which that company was vitally interested was then of no value. There is no actual fraud shown in the issuance of the stock afterwards purchased by Davis. Under our statute the court cannot readjust the matter by revising the judgment of the directors of the Mattress Company in fixing the value of the then much prized monopoly contract for the

exclusive right to market the products of the Oregon Pine Needle Fibre Company's factories for the period of ten years.

The decree of the lower court will therefore be reversed and the suit dismissed.

REVERSED AND SUIT DISMISSED.

MR. JUSTICE MCBRIDE and MR. JUSTICE BENSON concur.

Denied December 27, 1916. Rehearing denied February 13, 1917.

APPLICATION FOR SUPPLEMENTAL OPINION.

(161 Pac. 713.)

On application of appellant A. E. Davis for a supplemental opinion. Application denied. Petition for rehearing denied.

Messrs. Wood, Montague, Hunt & Cookingham, for the application.

Mr. Turner Oliver and *Mr. Frank S. Grant, contra.*

Department 2. MR. JUSTICE BEAN delivered the opinion of the court.

3. Defendant A. E. Davis has applied for a supplemental opinion adjudicating his claim against the assignee of the estate of the Hygienic Mattress Company, an insolvent debtor. It is stated in the application that Mr. Davis filed a claim against the insolvent company for over $6,000, representing the disbursements made by him in behalf of the corporation and overdue salary; that after a full hearing on the merits Judge CLELAND of the Circuit Court allowed the claim in full and entered an order requiring the assignee to list it

for payment of dividends. In the present suit against Mr. Davis to recover for unpaid stock subscriptions he pleaded the decree of Judge CLELAND rendered April 6, 1908, allowing his claim in the sum of $6,535.42, together with the other defense which is referred to in the original opinion in this case filed November 28, 1916. Upon the hearing of the present suit in the Circuit Court, as the application recites, Judge MORROW made a finding that Mr. Davis was entitled to a salary of $150 a month for sixteen months, or a total of $2,400, hence modifying the findings of Judge CLELAND concerning the salary and disregarding the same. According to the original opinion herein the decree of Judge MORROW will be reversed and the suit dismissed as prayed for in defendants' answer. It therefore becomes unnecessary in this suit to pass upon the claim of Mr. Davis for salary. The proceedings in the matter of the assignment of the Hygienic Mattress Company were not made a record in the present suit either as an exhibit or otherwise. Neither was the claim of Mr. Davis filed as an exhibit and the record in regard thereto is very meager.

We are of the opinion that this application seeks for an expression in advance in regard to the settlement of a claim against the assignee estate which, as the application states, has already been passed upon by Judge CLELAND of the Circuit Court, and from which no appeal has been taken. If it were necessary to further adjudicate the matter in this suit the record is not sufficient for such an adjustment. There is no further question involved herein which this court can legally decide or upon which it can express an opinion.

The application will therefore be denied.

APPLICATION FOR SUPPLEMENTAL OPINION DENIED.

REHEARING DENIED.

MR. JUSTICE HARRIS and MR. JUSTICE BENSON concur.

Argued January 24, modified February 20, rehearing denied April 3, 1917.

IN RE ALTHOUSE CREEK.

APPEAL OF LEONARD.

(162 Pac. 1072.)

Waters and Watercourses—Appropriation—Rights—Quantity of Water.

1. One entitled to a certain amount of water by appropriation is entitled to have this amount measured at the headgate of his lateral or service ditch, and not at the point of diversion from the stream, especially where these points are two miles apart, since in such case seepage and evaporation of water between these points would be considerable.

[As to right of appropriation of water for irrigation purposes, see note in 98 **Am. Dec.** 542.]

Waters and Watercourses—Appropriation—Action to Determine Rights—Decree Apportioning Water.

2. Under Section 6668, L. O. L., as to when water shall be appurtenant to land for irrigation purposes, a decree determining appropriation rights may apportion the water to a definite number of specified acres, for the purpose of making a record of the right and for the purpose of regulating the exercise of the right so as to economize water and prevent waste.

From Josephine: FRANK M. CALKINS, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

A petition for certain water users resulted in a determination made, pursuant to Sections 6635 to 6659, L. O. L., inclusive, by the state water board, formerly called the board of control, of the relative rights of the various claimants to the waters of Althouse Creek and certain of its tributaries. After making some modifications, which were clerical rather than otherwise, the Circuit Court approved the findings and order of determination made by the water board. Mary Ellen Leonard, one of the water users, has appealed from the decree of the Circuit Court.

MODIFIED. REHEARING DENIED.

For appellant there was a brief over the name of *Messrs. Emmons & Webster,* with an oral argument by *Mr. Lionel R. Webster.*

For respondents there was a brief and an oral argument by *Mr. Gus Newbury.*

Mr. Justice Harris delivered the opinion of the court.

The decree appealed from determines the names of the water users, the date of relative priority of the respective water rights, the amount of water to which each appropriator is entitled, the description of the lands or place of use, and the number of acres to be irrigated if the use is for irrigation. The findings mentioned thirteen different ditches of varying lengths and name eighteen different water users. One of the ditches is known in the record as the Beach & Platter-Leonard ditch although it is sometimes called the "Old Brown or Dunn ditch." This ditch serves two water users: George W. Dunn and Mary Ellen Leonard. The decree awards 2.2 cubic-feet per second to be used for the irrigation of 110 acres of land owned by George W. Dunn and assigns 0.96 of a cubic-foot per second to be used for the irrigation of 13 acres in the NW. ¼ of the NE. ¼, 24 acres in the NE. ¼ of the NW. ¼ and 11 acres in the SE. ¼ of the NW. ¼ of a designated section. The decree also gives 4 cubic-feet per second to Mary Ellen Leonard for the purpose of mining certain placer ground. Starting at the point of diversion the water is carried more than two miles along the Beach & Platter-Leonard ditch before it reaches the Dunn land and it flows from half a mile to a mile farther before coming to the Leonard land. The water board found that George W. Dunn and Mary Ellen

Leonard owned an undivided one-half interest in the Beach & Platter-Leonard ditch and that they "and their predecessors, have each and every year since about 1858 used the waters of Althouse Creek, diverted through their said ditch for the irrigation of their lands and for stock and domestic purposes"; and theirs is second in the order of priorities. The water board also found that:

"The character and kind of crops raised, nature of the soil, the methods and use of the waters of said stream and the climatic conditions prevailing in the vicinity of said lands and streams do not require at the present time for beneficial irrigation of said lands a greater amount of water diverted into and measured at the head of the respective ditches than at the rate of one cubic-foot of water per second of time for each fifty acres so irrigated."

1. The grievance especially emphasized by Mary Ellen Leonard grows out of the fact that the water assigned to designated tracts of land is required to be measured at the head of the ditch at the place where the water is diverted from Althouse Creek. The decree appealed from establishes an unvarying amount of water for each acre of land to be irrigated. The same inflexible basis is employed with every water claimant. Each acre is given two one hundredths of a cubic-foot of water per second on the theory that each given acre requires that amount of water for beneficial irrigation. The evidence sustains the contention of the appellant that she is entitled to 0.96 of a cubic-foot per second on the land. It is plain that 0.96 of a cubic-foot per second could not possibly be placed upon the land if only that amount should be diverted from Althouse Creek, for the reason that in the very nature of things seepage and evaporation will appreciably diminish the quantity diverted so that by the time the

water reaches the Leonard premises it will be materially less than 0.96 of a cubic-foot per second. The longer the ditch the greater is the loss from seepage and evaporation with the result that a user who takes water from the ditch at a point one mile from the head of the ditch or place of original diversion will really have more water than another person who takes water from the end of a ditch which is two miles in length. Since the appellant is entitled to have 0.96 of a cubic-foot per second on her land because of her right of appropriation dating back to 1858, it follows that she is entitled to have enough additional water diverted at the head of the ditch to compensate for seepage, evaporation and loss necessarily resulting from proper transportation of the water so that she will receive 0.96 of a cubic-foot per second of water at her land for use upon it. Under existing conditions to measure out at the place of diversion the exact amount which the claimant is entitled actually to put on the land is for all practical purposes equivalent to admitting a right and at the same time denying part of it. The water should be measured at the headgate or intake of the appellant's lateral or service ditch: *In re Willow Creek*, 74 Or. 592, 654 (144 Pac. 505, 146 Pac. 475). The quantity to be diverted into the ditch can be so regulated from time to time by the water master as to compensate for the loss necessarily resulting from proper transportation and at the same time enable the claimant to use, in the order of her priority, the quantity of water to which she is entitled.

2. Another assignment of error is predicated upon the contention that the court was without authority to apportion the water to a definite number of specified acres and that the court should have decreed that the whole amount of the water could be used indiscrimi-

nately upon any part of the land owned by Mary Ellen Leonard. Assuming without deciding that the Leonard water right, which was consummated and acquired before the enactment of Section 6668, L. O. L., cannot be inseparably tied to designated portions of land owned by appellant, nevertheless, it does not follow that the state cannot associate the right to use water with specified lands for the purpose of making a record of the right and for the purpose of regulating the exercise of the right so as to economize water and prevent waste. Although declaring that "all water used in this state for irrigation purposes shall remain appurtenant to the land upon which it is used," yet Section 6668, L. O. L., furnishes ample provision for the transfer of the right to other land. The objection made here is fully answered By Mr. Justice BEAN where he says *In re Willow Creek,* 74 Or. 592, 638 (144 Pac. 505, 146 Pac. 475):

"It would seem that the main purpose of said portion of Section 6668 is to make provision for preserving the record of water rights which have been adjudicated, and require one changing the use to make an application therefor to the water board. Otherwise the record of adjudicated water rights would become confused and worthless. It is not the purpose of this statute to divest anyone of a water right. The same effect should be given to the order of the water board."

The remaining assignments of error specified in the abstract of record were waived at the oral argument. The decree of the Circuit Court is modified, without costs. MODIFIED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued July 6, affirmed July 24, 1917.

EMERSON *v.* PORTLAND, E. & E. R. CO.*

(166 Pac. 946.)

Master and Servant—Restoration of Unsafe Place—Assumption of Risk.

1. Where a railroad which purchased a small feeder line in inferior condition and was repairing it knew that a trestle beside which it was building a fill was in excessively unsafe condition, but its employee in the construction work riding on a hand-car did not know it, the employee was not required to examine the trestle to ascertain its condition, having a right to assume that the road would not send him across a dangerous trestle.

[As to how far servant may rely on master's knowledge concerning risk, see note in 24 **Am. St. Rep.** 320.]

Master and Servant—Assumption of Risk—Obvious Danger—Question for Jury.

2. Whether the dangerous condition of the trestle was so open and obvious that the employee must have observed it, *held* for the jury as a question of fact.

Master and Servant—Safe Place to Work.

3. It is the duty of the master to furnish the employee a reasonably safe place to work, a duty performed when he has exercised reasonable diligence to do so.

Master and Servant—Safe Place to Work—"Reasonably Safe"—"Reasonable Safety."

4. The term "reasonably safe," used in relation to a master's duty to furnish safe tools and a safe place to work, implies such measure of safety as accords with common usage and practice in matters of a particular character; "reasonable safety" implies such a condition as ordinary care and diligence will secure.

Appeal and Error—Harmless Error—Instruction.

5. In a railroad employee's action for injuries on a trestle, in the absence of request by the road for an instruction that it was under duty to use ordinary care to make the trestle reasonably safe, where there had been utter lack of diligence of the road's servants in respect to taking precautions for the safety of persons passing over its road, the omission to give such an instruction was harmless to the road.

Trial—Instructions—Repetition.

6. The refusal of instructions covered by the general charge was not erroneous.

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*On knowledge as an element of an employer's liability to an injured servant, see comprehensive note in 41 **L. R. A.** 33.

On the general rule with respect to places and appliances furnished to servant, see note in 6 **L. R. A. (N. S.)** 602. REPORTER.

From Multnomah: WILLIAM N. GATENS, Judge.

Action by S. E. Emerson against the Portland, Eugene & Eastern Railroad Company, a corporation, to recover damages for a personal injury. From a judgment in favor of plaintiff, defendant appealed. Affirmed.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This is an action to recover damages for a personal injury received by plaintiff and occasioned by a hand-car upon which plaintiff was injured. The action was brought under the Federal Employers' Liability Act. The complaint alleged that on August 24, 1913, plaintiff was engaged as a laborer performing section work for the company, and that upon that date while so employed he was riding upon a hand-car of defendant across a trestle of defendant's road, and that while so riding the car left the track and plaintiff was thrown from said car and received the injuries of which he complains. Defendant is charged with negligence in the following particulars:

"(a) That the trestle hereinabove referred to, which was maintained by defendant, and over which plaintiff was riding upon said hand-car was carelessly and negligently maintained, in that the same was old, worn, dilapidated and in such an old, worn, and dilapidated condition that the rails upon said track were not permanently or securely fastened to the ties; that said ties were loose and irregularly spaced, and there was not a sufficient number thereof; (b) that said rails were old, worn, warped, and bent, and out of alignment, and insufficiently and improperly fastened together."

Defendant answered denying plaintiff's injury, and alleged the dilapidated condition of its trestle and by way of a separate defense set up the following facts:

"That the trestle referred to in plaintiff's complaint was a part of the line of the Corvallis & Alsea River Railroad which prior to the time of the accident described in plaintiff's complaint had been purchased by this defendant; that this defendant was at the time engaged in the construction of a new trestle to replace the said old trestle, and also engaged in the reconstruction of the said line of railroad of the said Corvallis & Alsea River Railroad; that plaintiff's duties were to assist in said reconstruction of said line and in working upon said tracks in order that the same might be safe and secure for the travel of trains. * * That during all of the times mentioned in plaintiff's complaint said line of railroad was used by this defendant for the purpose of transporting thereover loaded and empty freight and passenger cars, and that upon said freight-cars, were carried freight originating at points in the state of Oregon and destined to points outside of the state of Oregon; also freight originating at points outside the state of Oregon and shipped to points in said state of Oregon, on the defendant's line of railroad; that said section of railroad upon which plaintiff was employed as a section laborer was an integral part of defendant's system of railways and was used by defendant in carrying on its business of interstate and intrastate commerce. * * That for a long time prior to August 24, 1913, plaintiff had been a section laborer and had worked in and around railroad tracks and had particularly worked in and around the tracks of this defendant near the city of Corvallis, including the trestle referred to in plaintiff's complaint; that at all the times mentioned in plaintiff's complaint and for a long time prior thereto plaintiff fully knew, understood, and appreciated the condition of said track and trestle, and fully knew, understood, and appreciated the risks and dangers of riding over the same on hand-cars and that said risks and dangers were open and obvious, and plaintiff understanding and appreciating such perils, the same being open and obvious, continued working for this defendant and riding over said trestle, thereby assumed any and all

risks of accident to himself arising therefrom, and that the said accident to plaintiff and whatever injuries resulted to plaintiff therefrom, was caused by one of said risks so assumed by the said plaintiff."

The new matter having been put in issue by appropriate denials there was a jury trial and verdict and judgment for the plaintiff, from which defendant appeals.

At the conclusion of plaintiff's testimony there was a motion for a nonsuit, which was overruled. Among others the court gave the following instruction, which was excepted to by defendant, and is assigned here as error.

"I instruct you that every employer has the right to choose the appliance to be used in his business, and to conduct his business in a manner most agreeable to himself. It is not required nor obliged to change its bridges from old to new in order to secure the greater safety of its employees, provided the old bridge is a reasonably safe one, and an employee who enters its service with the knowledge of circumstances attending his employment cannot complain of his master's customs or habits, nor recover for injuries in and resulting from that particular service. In other words, in this case the defendant company had a right to use the old bridge; it was not required to build a new bridge, provided the old bridge was a reasonably safe bridge. That is the point. As I said in the other instruction a man can conduct his business in any way he sees fit, and he is not held accountable because he does not use a new machine, but the law says he must use one that is reasonably safe. That is the degree of care he is required to furnish. The question you are to determine is whether or not this particular bridge was reasonably safe. If you find it was not in a reasonably safe condition, the question you ask yourself is, did the defendant know it to be unsafe, or did it have reason to believe it to be unsafe. If it knew the bridge was not reasonably safe for employees to go over it on

a hand-car in order to get to their work, or had reason to believe it was not safe, then the law says you are chargeable with negligence and it is accountable to him personally by reason thereof; unless the party who went over the bridge has reason to believe or knew or had reason to believe the bridge was unsafe."

Exception was also taken to certain remarks of counsel for plaintiff made during the progress of the trial, which will be noticed in the opinion. AFFIRMED.

For appellant there was a brief over the names of *Mr. Ben C. Dey, Mr. William D. Fenton, Mr. Ralph E. Moody* and *Mr. John F. Reilly,* with an oral argument by *Mr. Dey.*

For respondent there was a brief over the names of *Messrs. Davis & Farrell* and *Mr. E. E. Wilson,* with an oral argument by *Mr. W. E. Farrell.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

There is little dispute concerning the facts in this case, which are these: The defendant was engaged in constructing a line of railroad from Corvallis to Eugene through the town of Monroe, which is an intermediate point between Corvallis and Eugene. The Corvallis and Alsea Railroad Company had a line of road running from Corvallis to Monroe, a distance of about eighteen miles, which defendant purchased to be used in making a part of the connection. This purchase was made in 1912. The road was not in good condition when purchased not being properly ballasted, the ties being of inferior quality, the steel light, the trestles in poor condition, and the whole road being far below the standard of the Southern Pacific railroad system, which is an interstate road and of which the Portland, Eugene & Eastern is a part. While the

road from Corvallis to Monroe was not up to the standard of the Southern Pacific system and was run down and deficient in the particulars above stated, there was no evidence that it was actually unsafe or dangerous at any point except the trestle where this plaintiff was injured, and after the purchase the defendant constantly used it for the passage of its trains carrying freight and passengers as well as trains carrying gravel used in ballasting the road between Corvallis and Monroe and also to points on the Southern Pacific system north of Corvallis. Immediately after the purchase the defendant began a practical reconstruction of the line. It did not attempt to rebuild the trestle upon which plaintiff was injured, but began a fill of considerable length immediately west of it, the trestle itself being the northerly approach to a bridge across Mary's River, which flows through the southerly portion of Corvallis. The fill ran practically parallel to the trestle and approached the northerly end of the bridge proper and was designed when completed to take the place of the trestle. Its distance from the trestle is not stated, although it appears from the testimony that it was some 50 feet from that part of the trestle where the accident occurred, and it appears that the fill and the trestle converge at the northerly end of the bridge and that the fill in addition to being more permanent in its character obviated a curve which existed on the trestle near the north end of the bridge proper. The plaintiff was a common laborer on the section, a farmer by vocation, and had only the knowledge of railroads that farmers usually possess. He resided in Corvallis and had been employed upon the road engaged in ballasting and such work about five months previous to the accident. He had never worked upon the trestle or

walked over it before the accident, but was employed for the most part farther south and as far sometimes as twelve miles from Corvallis. He, with other employees, was taken to his work upon a hand-car of the company. The car was new and in good condition. He testifies that he never observed the condition of the trestle, and knew nothing of any defects in it. The evidence indicates that the trestle was in even a worse condition than that mentioned in plaintiff's complaint. This description of it is given by a witness for plaintiff:

"The rails were crooked; the ties were not spaced; there were places all the way from, oh, six to eight inches up to two feet wide where the ties were on the track and were not spiked down good; the spikes about half drove; the rails were very kinky, low joint and centers."

The defendant's superintendent of construction testified in regard to the condition of the trestle as follows:

"What condition were the ties of the trestle in?

"A. The ties were split by being skewed around—the action of loads going over the trestle, and they were further split by making an endeavor to spike them to the stringers to hold them in proper place.

"Q. What were these conditions on the surface, were they to be seen?

"A. They were.

"Q. What, if anything, was there to prevent a man who was traveling over the trestle, on a hand-car, or any other vehicle, or any other kind of a car, from observing these conditions of the trestle?

"A. A man could readily see by a casual examination the condition of the deck of the trestle.

"Q. How were the rails?

"A. The rails were old and surface bent, and some ball worn.

"Q. What was there to prevent an ordinary person from seeing those things?

"A. Nothing.

"Q. You said a moment ago a person could observe the condition by a casual examination, what did you mean by that? Do you mean by going there for the purpose of examining it?

"A. I mean it was not necessary to examine the trestle with a microscope to see it was not in proper condition.

"Q. What would you say about its being so obvious that any person going over it would see it?

"A. It could readily be seen that the structure was not in good condition.

"Q. And the cracks and unevenness in the ties, could any person who looked fail to see them?

"A. They were in evidence.

"Q. The condition of the rails, could anybody who looked fail to see that?

"A. He could not."

The witnesses for plaintiff and defendant vied with each other in detailing the disreputable and dilapidated condition of the trestle, the plaintiff endeavoring to show the gross negligence of the defendant in sending the plaintiff to his work over such a ruinous structure and the defendant seeking to demonstrate that its unsafe condition was so obvious that plaintiff must have observed it and assumed the risk of going to his place of labor by that route. There can be no question but that the trestle was unsafe and that those in charge of the work there knew that fact and postponed repairs until the completion of the fill should dispense with the necessity of making them. The defendant's foreman testified that in going over it for the first time on the train the ties rattled so that he could hear them above the noise of the train, so that the unsafe condition of the structure and knowledge of this fact by the de-

fendant's agents on the ground must be taken as established.

1, 2. Did the plaintiff assume the risk likely to result from the conditions shown by going to and from his work across the trestle? If a section laborer engaged in work upon a road which is to be repaired assumes the risks incident to traveling in a car across the trestles which carries him to his place of employment, the plaintiff assumed the risk incident to crossing the trestle. Reduced to its lowest terms defendant's proposition amounts to this: The road from Corvallis to Monroe was out of repair and unsafe. This whole eighteen miles constituted a "place." Plaintiff, who was working several miles from the trestle, was engaged in making this dangerous "place," i. e., the whole road, safe, and, therefore, assumed all the risks incident to the work of restoring any part of this stretch of road to its normal condition of safety. This argument proceeds upon the faulty assumption that the whole road or any considerable part of it was in an unsafe condition. The evidence merely indicates that it was somewhat out of repair and not up to the standard of the great transcontinental system of which it was to be a feeder, but beyond this there is no substantial evidence that its general condition rendered it unsafe for travel. Passenger, freight, and gravel trains went over it every day, and no accidents or even delays are mentioned in the evidence. That other sections of the road other than the trestle may have been in an unsafe condition is true, but that there was any risk involved in the particular work in which plaintiff was engaged, which consisted of tamping the ties and raising portions of the track, or that it was in itself dangerous work, is not shown. He was not working upon the trestle, and was not a bridge

builder, or mechanic, and so far as being exposed to any danger by reason of his employment there is no evidence that there were any risks attending it either obvious or latent, if we except his being carried over a defective and unsafe structure of whose dangers he was ignorant to and from a place where he could work in absolute safety. The whole doctrine of assumption of risk under circumstances of making a dangerous place safe is summed up by Labatt as follows:

"The principle has already been stated (section 924, *ante*), that a master's obligations to servants engaged in doing work of which the essential purpose is to bring the material substances which will compose the plant into a condition in which they will be suitable for use as instrumentalities of a going concern are less onerous than the obligations which he owes to the servants who deal with those instrumentalities when the business is in operation. When viewed from our present standpoint, facts of the kind involved in the cases in which this principle is regarded as furnishing a protection to the master are usually such as to bring them within the scope of the defense now under discussion. The position taken is that, although the servants belonging to the former of the classes above specified are sometimes exposed to certain risks which are different in character from, as well as greater in degree than, those encountered by the other class of servants, there is no logical ground upon which it can be asserted that these risks, if they are, as a matter of fact, ordinarily and naturally incidents of the work to be done, are not impliedly assumed like other kinds of risks which answer that description. The necessary qualifications of this principle are indicated by the decisions that it can only be invoked against servants who are actually connected with the work of construction; that those servants are entitled to expect a degree of care and skill equal to that ordinarily exercised in railway construction; and that the defense of an assumption of ordinary risks is not a bar to the action,

where such servants are injured by a defect in a portion of the road which is already in operation. * * A principle analogous to that which is stated in the preceding section is that a servant who engages in the work of bringing back to a safe condition any part of the plant which has become abnormally dangerous assumes all the risks which are obviously incident to the work thus undertaken. As regards such a servant those risks are ordinary, even though their existence may, as regards servants whose duties involve merely the use of the instrumentality in question, imply culpability on the master's part. In other words, a servant put to work to repair a defective appliance cannot be heard to complain of its being defective, 'inasmuch as that very thing is the cause of his being there, and he undertook to set it right, being paid for the risk he ran, and voluntarily incurring it.' The rule which casts upon the master a liability for failing to provide reasonably safe instrumentalities for the use of his servants is deemed to be suspended under such circumstances'': 3 Labatt's M. & S (2 ed.), §§ 1175, 1176.

The research of learned counsel for defendant has brought to our attention many cases supporting the proposition that where a servant is engaged to make a dangerous place safe, he assumes all the risks necessarily incident to his employment, but none of them go to the extent claimed for defendant in the case at bar. *Carlson* v. *Oregon Short Line etc. Ry. Co.*, 21 Or. 450 (28 Pac. 497), cited by defendant, arose under an entirely different state of facts. Heavy rains had occurred along the road, which occasioned floods and landslides for a considerable distance on that line and rendered the track dangerous for travel. The plaintiff's intestate had been sent out with others to repair and make safe the dangerous portions, and a bridge within the dangerous area gave way, whereby the laborer was killed. The pleadings are not stated in the opinion, but by reference to the case of *Knahtla*

v. *Oregon S. L. etc. R. Co.*, 21 Or. 136 (27 Pac. 91), which arose out of the same accident and was tried by the same attorneys, it is probable that the negligence charged was the same as in that action, which is as follows:

"Defendant negligently and carelessly permitted it (bridge) to become and remain out of repair and in an unsafe condition, and negligently and carelessly failed to keep a proper watch and oversight over the same, and negligently and carelessly failed and omitted to ascertain the condition of the same, and to report it to the officers in charge of the train upon which plaintiff was being carried."

Mr. Justice BEAN in his opinion says:

"The court instructed the jury that it is a personal duty the master owes the servant to provide a reasonably safe place for him to work, and to use due and reasonable diligence to make and keep its road-bed and bridges safe for the carriage of persons over the same, and this duty cannot be delegated to an employee so as to relieve it from liability. And, if the master undertake to carry the servant over its railroad from one place to another for the performance of the duties of such servant, it is the duty of the master to furnish a reasonably safe road-bed upon which to carry the servant to his work; and for any neglect of this duty the master is liable to an injured servant. As an abstract proposition of law this rule is probably correct, and in a proper case would be unobjectionable. (*Anderson* v. *Bennett*, 16 Or. 515 (19 Pac. 765, 8 Am. St. Rep. 311); *Miller* v. *Southern Pac. Co.*, 20 Or. 285 (26 Pac. 70).) But it can have no application to the facts of this case. Here, the road of defendant was known to the deceased to be out of repair, and in a dilapidated condition, so much so that the traffic thereon was entirely suspended, and the deceased was employed to assist in putting it in a reasonably safe condition for the passage of trains. In accepting such employment, and undertaking to perform the services

required of him, he voluntarily and necessarily assumed, as part of his contract of employment, the risks incident thereto, among which was the dilapidated condition of the track. * * By the instruction, as given in this case, the jury was told, in effect, that although the deceased knew that the track of defendant was obstructed by slides and damaged by storms, and was not in a safe and proper condition for use, and with knowledge of that fact went out upon a train, with the express purpose of repairing such damages and removing the slides, or assisting others to do so; yet, nevertheless, the defendant was bound to furnish him exactly the same reasonably safe track and road-bed which the law would have required it to furnish had he been engaged in the operation of a train thereon in the ordinary course of business, or had he, in the course of his work, been riding over a road presumedly in good condition. This was not the correct measure of the defendant's duty toward the deceased under the facts of this case."

He further observes:

"The train upon which he was riding was, with the workmen aboard, patrolling the road, under the direction of the road-master, for the purpose of opening and repairing the same, and was the means of transportation from one place to another, as the necessities of the work might require. He, therefore, took upon himself the risks necessarily incident to the employment from the damaged condition of the track, unless, perhaps, they were latent and known to the master, but not known to nor by the use of proper diligence discoverable by him; but he did not take on himself risks, if any, which arose by reason of the negligence of the master, unless they were known to him, or by the use of proper diligence were discoverable by him. So far as the danger of making the repairs was increased by the damaged condition of the track, from natural causes, he assumed the risks of such enhanced danger; but if it were increased by the neglect of the master to use proper care, before the storm, to keep

the bridge in repair, or to ascertain the condition of the track or bridge after the storm, or to take such due and proper precautionary measures to prevent accidents to its employees, as the exigencies of the situation might require, he did not assume such risks."

In the case cited the lower court in its charge made no distinction between an employee who, upon the theory of the defendant, was engaged in making the place where he was injured safe, and one who was being carried to a safe place to pursue a safe occupation and failed to take into consideration exigencies which might prevent the master from discovering dangers and guarding against them—exigencies which were as well within the cognizance of the employee as the employer. Here there was no such exigency. The employer knew the condition of the trestle. The plaintiff did not know it and was not required to examine the trestles and bridges over which he passed to ascertain their condition. He had a right to assume that his employer would not send him to his place of labor across a dangerous trestle and to act upon that assumption. It is contended that the condition was so open and obvious that plaintiff must have observed it, but this was a question of fact for the jury. He observed passenger and freight trains pass over it every day, and seeing this might in itself serve to reassure him when we take into consideration the fact that he was a farmer and not a railroad man. In view of the testimony as to the condition of the trestle it seems astounding that those in charge of the road permitted freight and passenger trains to cross it, and the defendant is fortunate that it was this hand-car that was derailed instead of a heavier car loaded with passengers. The authorities cited all relate in substance to cases where the injured person was engaged in re-

pairing or reconstructing the particular dangerous thing or improving the specific dangerous place where the injury occurred, or by which it was occasioned, and all proceed upon the theory that if a man contracts to perform a dangerous work, he assumes the risk of such known and necessary danger and bargains for compensation accordingly.

3–5. The next matter discussed is the charge of the court in relation to furnishing the plaintiff a safe place to work. So far as it goes and as applied to the facts of this case the instruction is good law. It is the duty of the master to furnish the employer a reasonably safe place to work. That duty is performed when he has exercised reasonable diligence to secure that end. The rule is stated by different courts in different language, some using the expression found in *Rush* v. *Oregon Power Co.*, 51 Or. 519 (95 Pac. 193), where it is said:

"It was incumbent upon the defendant to exercise diligence to furnish to its servants reasonably safe appliances, and, in the absence of any notice thereof, the plaintiff had the right to assume that this duty had been fully discharged by the master."

See, also, *Millen* v. *Pacific Bridge Co.*, 51 Or. 538 (95 Pac. 196); *Allen* v. *Standard Box & Lumber Co.*, 53 Or. 10 (96 Pac. 1109, 97 Pac. 555, 98 Pac. 509); *Galvin* v. *Brown & McCabe*, 53 Or. 598 (101 Pac. 671); *Moulton* v. *St. Johns Lbr. Co.*, 61 Or. 62 (120 Pac. 1057). Other cases in this state approve substantially the language used by the court in the instruction given in the instant case. Thus in *Kovachoff* v. *St. Johns Lbr. Co.*, 61 Or. 174 (121 Pac. 801), this language is employed:

"Independent of any statute, the master is bound to furnish for his employees a reasonably safe place in

which to work, and reasonably safe tools and appliances with which to operate."

And in *Field* v. *Northwest Steel Co.*, 67 Or. 126 (135 Pac. 320), it is said:

"Bearing in mind, also, that by a thoroughly established rule it is the nondelegable duty of the master to furnish the employee with reasonably safe tools with which to work, we observe that at the time the accident happened, the foreman was engaged in preparing a tool for the use of the plaintiff."

See, also, *Morandas* v. *L. R. Wattis Co.*, 71 Or. 367 (142 Pac. 537). The term "reasonably safe" implies such measure of safety as accords with common usage and practice in matters of a particular character. "Reasonable safety" implies such a condition as ordinary care and diligence will secure. There is a slight technical distinction between using ordinary care and diligence to make a structure reasonably safe and actually making it so, but it is one that would not appeal to the average juror. In the case at bar it is so evident from the testimony of defendant's own witnesses that no diligence whatever was used to make the trestle reasonably safe that an instruction to the effect that defendant should have exercised reasonable diligence to make it so would have been useless. The instruction which we criticised in *Olsen* v. *Silverton Lbr. Co.*, 67 Or. 167 (135 Pac. 752), was as follows: "The defendant must also provide safe and suitable appliances," etc. This instruction left out the words "reasonably safe" used in the instruction here, and made the employer an absolute insurer not only of the safety of its appliances, but of the skill and competency of plaintiff's fellow-servants. As we before remarked the instruction given in this case was good so far as it went. If defendant had asked for an instruc-

tion couched in the language employed in *Millen* v. *Pacific Bridge Co.*, 51 Or. 538 (95 Pac. 196), it would have been proper to have given it, although in view of the utter lack of diligence of defendant's servants in respect to taking precautions for the safety of persons passing over its road such an instruction could not possibly have changed the result. There was no such request, and we are satisfied that the defendant was not injured by the omission.

6. Exception is taken to refusal of the court to give certain instructions asked by defendant. In some respects these were inapplicable, and so far as applicable they were sufficiently covered by the general charge.

Exception was also taken to certain remarks of counsel for plaintiff wherein he denounced the defendant in very strong terms for its negligence. There was some ground for the censure passed by counsel, and it did not go beyond what counsel very frequently indulge in when wrought up by the excitement of the trial or when demonstrating to a client that they are earning their fee. We cannot say that it was so intemperate as to justify a reversal of the case, although such appeals are in bad taste and usually ineffective for good or harm. Other alleged misconduct of counsel is discussed in the brief, but is not assigned in the abstract, and will not be considered.

Upon the whole case we are of the opinion that the record is free from prejudicial error, that the defendant had the advantage of a fair and impartial trial, and that the judgment should be affirmed.

AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MCCAMANT concur.

Argued on demurrer July 12, sustained and proceeding dismissed July 24, 1917.

BETHUNE v. FUNK, AUDITOR.

(166 Pac. 931.)

Elections—Primary Election—Nature.

1. Under the direct provisions of Section 3350, L. O. L., a primary election affords electors opportunity to express their choice of one or more candidates for an office to be voted for at an ensuing election.

Elections—"General Election."

2. A general election is one that regularly recurs in each election precinct of the state on a day designated by law for the selection of officers, or is held in such entire territory pursuant to an enactment specifying a single day for the ratification or rejection of one or more measures submitted to the people by the legislative assembly, and not for the election of any officer.

Elections—"General Election"—What Constitutes.

3. An election for ratifying legislative enactments is a general election within Section 3322, L. O. L., as amended by Laws of 1917, Chapter 330, providing that, where a general election for both county and city is held on the same day, election clerks shall receive only one fee, although one of the measures submitted (Laws 1917, c. 422 § 1), pursuant to a phrase in Article IV, Section 1, of the Constitution, referred to such election as special.

[As to constitutional or statutory provisions relating to elections as applicable to primary elections, see note in **Ann. Cas.** 1913A, 702.]

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE MOORE.

This is an original proceeding by W. B. Bethune against George R. Funk, as auditor of Portland, Oregon, and other executive officers thereof to compel the allowance and payment of the petitioner's claim of $3 for services rendered as a judge of election. From a statement of the case as made it appears that pursuant to Section 123 of the charter of that city a general municipal election was held therein June 4, 1917, at which time an election was also held in the several voting precincts of the state to determine whether or

not certain measures proposed by the legislative assembly should be ratified by the people (Gen. Laws Or. 1917, Chapters 422, 423); that election precinct No. 204 of the City of Portland is identical with election precinct of the same number in Multnomah County, Oregon; that the board of county commissioners of that county duly appointed two boards for that precinct, one to act during the day of election to receive the ballots when cast, and the other to serve at night to canvass the votes polled and make due return thereof, of which latter board the petitioner was a member; that the council of that city, pursuant to an ordinance, also duly appointed the petitioner a member of the night board of the municipal election held in that precinct; that on May 28, 1917, the board of county commissioners of Multnomah County adopted a resolution to the effect that whenever boards of election jointly acted for that county and the City of Portland, only one *per diem* compensation therefor should be made, and that when so paid by the county the city would repay one half of the sum so expended, which resolution was concurred in by the city council; that the petitioner duly accepted the appointments so made and jointly served with others as a member of the night board of election in such precinct, the ballots, ballot-box, and tally-sheets for the state election having been furnished by Multnomah County, and like supplies for the municipal election by the City of Portland; that he discharged all the duties demanded of him, for which the county paid him $3; and that he was entitled to a like sum from the city, which refused to pay any part thereof. A demurrer to the alternative writ on the ground that it does not state facts sufficient to authorize the relief demanded presents the question to be considered. DEMURRER SUSTAINED.

For plaintiff there was a brief over the names of *Mr. George Mowry,* Deputy District Attorney, and *Mr. Walter H. Evans,* District Attorney, with an oral argument by *Mr. Mowry.*

For defendants there was a brief over the names of *Mr. Lyman E. Latourette,* Deputy City Attorney, and *Mr. Walter P. La Roche,* City Attorney, with an oral argument by *Mr. Latourette.*

MR. JUSTICE MOORE delivered the opinion of the court.

Section 3322, L. O. L., was amended by an act approved February 20, 1917 (Gen. Laws Or. 1917, Chap. 330) so as to read:

"There shall be allowed by the county court of each county to the several judges and clerks of election $3 per day while holding elections * * ; *and it is provided* that in incorporated cities and towns where a city, primary, or general election is held on the same day and within the same hours as a primary or general election under the laws of this state and the election precincts within any such city or town do not embrace territory outside of the corporate limits thereof, the judges and clerks of election shall render the required service as such judges and clerks of such city or town election without additional compensation * * ; *provided,* that incorporated cities and towns holding elections on the same day of such primary or general election, and using the services of judges and clerks, shall bear their *pro rata* expense of such election."

1. The proper meaning of the phrase "a primary or general election under the laws of this state" as thus employed must necessarily determine the controversy. A primary election is the opportunity given by law to electors enabling them to express

their choice by ballot of one or more candidates for office to be voted for at an ensuing election: Section 3350, L. O. L. In *Marsden* v. *Harlocker,* 48 Or. 90, 94 (85 Pac. 328, 120 Am. St. Rep. 786), it is said:

"If, by operation of law, the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general, in which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat."

The description of a general election thus given, though applicable to the facts there involved, is not broad enough to include all elections that might properly come within the modifying term "general." Article IV, Section 1 of the organic law of the state declares:

"All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election."

The meaning of the clause, "except when the legislative assembly shall order a special election," might as well have been rendered by the expression, "except when the legislative assembly shall otherwise order." It was the time and not the kind of election that was being thus distinguished. The phrase "biennial regular general election" in the excerpt last set forth would necessarily imply, by comparison, a "special general election," so that the qualifying word "special" has in this instance no particular significance. The phrase "general election" will be found in Sections 2943, 2944, 2947, and 2948, L. O. L. In referring thereto Section 2952, L. O. L. reads:

"The general election at which such officers, or either of them, must be elected is the general election next preceding the expiration of the term of the then incumbent of such office."

Section 3303, L. O. L., was amended so as to read:

"A general election shall be held in the several election precincts in this state on the first Tuesday after the first Monday in November, 1914, and biennially thereafter. Gen. Laws Or. 1913, Chap. 288."

The Governor is required to issue writs of election to fill such vacancies as may have occurred in the legislative assembly: Article V, Section 17 of the Constitution. The statute regulating the exercise of such prerogative declares:

"The governor shall issue a writ of election, directed to the sheriff of the county, or sheriffs of the counties composing the district in which such vacancy shall occur, commanding him or them to notify the several judges of election in his county or their district to hold a special election to fill such vacancy or vacancies, at a time appointed by the governor": Section 3431, L. O. L. See also Section 3438, L. O. L.

2. A consideration of these provisions induces the conclusion that a "general election" is one that regularly recurs in each election precinct of the state on a day designated by law for the selection of officers, or is held in such entire territory pursuant to an enactment specifying a single day for the ratification or rejection of one or more measures submitted to the people by the legislative assembly, and not for the election of any officer.

3. Section 1 of Chapter 422, Gen. Laws Or. 1917, conforming to a statement contained in Article IV, Section 1 of the Constitution of this state, declares:

"A special election shall be held in the several voting precincts of this state on the forth (fourth) day of June, 1917."

The use of the qualifying word "special" as thus indicated did not make the election so to be held of that kind, for the election having been simultaneously held in every voting precinct of the state conclusively establishes the fact that the election was general and not special, which latter term, though not involved herein would appear to mean an election held in only a subdivision or a part of the state. Such being the case Chapter 330, Gen. Laws Or. 1917, is controlling, and the petitioner herein having been paid by Multnomah County for the services which he performed is not entitled to any further remuneration from the City of Portland or its executive officers.

It follows from these considerations that the alternative writ does not state facts sufficient to authorize the relief demanded, the demurrer thereto is sustained, and the proceeding is dismissed.

DEMURRER SUSTAINED. PROCEEDING DISMISSED.

MR. JUSTICE BURNETT not sitting.

Argued June 6, reversed and remanded on appeal of defendant June 26, rehearing denied July 24, 1917.

REICHERT *v.* SOOY-SMITH.*

(165 Pac. 1174, 1184.)

Mortgages—Mortgagee in Possession—Compensation for Improvements.

1. Purchaser of an orchard at mortgage foreclosure sale cannot, after the debtor has redeemed the property, recover his expenses and the value of his services in attempting to eradicate pear blight from the orchard, since, under Section 248, L. O. L., as to manner of redemption, debtor is not required to pay such purchaser the moneys necessarily expended by him in preserving the estate from loss and injury.

*On right and duty of mortgagee in possession as to repair or improvement of property, see note in 49 **L. R. A. (N. S.)** 122.

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Mortgages—Redemption—Use and Occupation.

2. Redemptor may recover of purchaser at foreclosure sale the reasonable value of the use and occupation of the premises during the time they were in his possession, without regard to what purchaser may have realized therefrom.

Mortgages—Use and Occupation—Setoff.

3. Purchaser of land at foreclosure sale may setoff against reasonable value of use and occupation of premises during time they were in his possession money spent in care and cultivation of property and in protecting it from deterioration, together with reasonable value of his own services in such work.

[As to purchaser of mortgaged property subject to redemption as having an "interest" in property, see note in **Ann. Cas.** 1912E, 526.]

Mortgages—Mortgagee in Possession—Compensation for Improvements.

4. A purchaser of an orchard at mortgage foreclosure sale cannot, after redemption, recover of judgment debtor his expenses in cultivating it, under Section 249, L. O. L., which requires restoration of debtor to his estate on redemption, as there is no counterpart to this in the Code whereby purchaser may charge judgment debtor with disbursements in operating the premises.

Mortgages—Redemption—Use and Occupation.

5. Judgment debtor, on redemption, has no right of action against purchaser at mortgage foreclosure sale for mere use and occupation, but only for actual profit he has made out of the property through use: Section 251, L. O. L.

From Jackson: FRANK M. CALKINS, Judge.

Action by S. F. Reichert against Josephine Sooy-Smith in which a judgment was entered on the verdict of a jury and defendant appealed. Reversed and remanded.

Department 1. Statement by MR. JUSTICE BENSON.

A mortgage upon a certain orchard of 19 acres having been foreclosed in the regular way, one F. L. Tou Velle became the purchaser at execution sale and thereafter the plaintiff bought from Tou Velle all of his interest in the premises. Plaintiff entered into possession of the property, cultivated, pruned, sprayed and otherwise cared for the fruit trees for

nearly a year and, having harvested the crop, received therefor the gross sum of $166.89. A few days before the expiration of the year following the confirmation of the sale, the defendant redeemed the property by paying the amount of the purchase price with 10 per cent interest and resumed possession of the premises. Thereafter plaintiff began this action to recover the expenditures and services in caring for the orchard during the time that he was in possession as such purchaser. The portions of the complaint deemed important in the consideration of the case are as follows:

"That said premises, and the whole thereof, constitute an orchard tract, and at the time of said sale, and ever since said time, have had, and now have growing thereon, certain pear, apple, peach, plum and cherry trees, most of which are now in bearing, producing fruit of a commercial nature, character and quality, and of the age of from 6 to 18 years.

"That at the time the plaintiff entered into possession of said premises herein described, and sold upon foreclosure sale as aforesaid, said orchard and fruit trees growing thereon were in a very bad, decayed, misused, neglected, wasted, rundown and dilapidated condition, and many of said fruit trees in said orchard and upon said premises were affected and afflicted with a disease, commonly known as 'pear blight.' That said disease was and is very destructive and injurious to fruit trees, and in order to eradicate, cope with and get rid of the same it is and was necessary to cut out part of the limb or tree so affected.

"That at the time said plaintiff took possession of said premises said fruit trees were badly in need of spraying, the ground in said orchard was badly in need of cultivation and said fruit trees, said ground in said orchard and said orchard were badly in need of various cares and practices necessary in the offices of good husbandry. * *

"That during the time of the plaintiff's possession of said property, and on or about March 25, 1914, he was notified by one Elmer Oatman, who at said time was a fruit inspector of Jackson County, Oregon, that certain fruit trees situated upon said premises herein described were affected, and afflicted with said 'pear blight,' and were a menace to the community, and that steps must be taken by the plaintiff to eradicate said evil, to wit: said 'pear blight,' either by taking out the trees, or cutting out and off the limbs or other parts of those trees so affected, and upon failure upon the part of the plaintiff so to do, he the said fruit inspector would take these necessary and proper steps himself, and the cost of the same would thereby become a lien and charge against said property.'

"That the plaintiff immediately complied with said order, and said instructions and began to cut out said 'pear blight' wherever and whenever he found the same in said orchard, and in said fruit trees, and attempted to eradicate the same as well as possible.

"That from said March 21st, 1914, the date when plaintiff entered into possession of said premises, and up to March 26, 1915, the date when he surrendered the possession thereof to the redemptioner, said defendant herein, plaintiff was forced to expend, and did expend in cultivating, taking care of said fruit trees and said orchard, and in eradicating and cutting out said blight, as aforesaid, and in the purchase of materials for use upon, and which were used upon said fruit trees, and upon said orchard, spraying, etc., the full sum of $574.45. That the real and reasonable value of plaintiff's own services in cutting out said blight, cultivating, taking care of said orchard and fruit trees, spraying, etc., was and is the sum of $500. That each, every and all of said services so rendered, and performed, whether by the plaintiff himself, or whether performed by someone else, for which he paid, and said material so used, were necessary, proper and needful in the care and management of said orchard and said fruit trees and

said premises, and were and are in accord with the practice of good husbandry, and greatly and materially assisted and benefited said orchard, said premises and said fruit trees, and without the same said orchard and fruit trees would now be practically worthless and of no value as a commercial orchard or otherwise. That the plaintiff received from the sale of fruit taken from said orchard, and said fruit trees growing thereon, the full sum of $166.89, leaving a balance in the sum of $907.56 due plaintiff for his work, labor, services so rendered and performed and amount expended in the care, cultivation, cutting out blight, spraying and for materials furnished and provided as aforesaid.

"That no part of said sum of $907.56 has ever been paid, but the whole amount of which is due and owing unto the plaintiff herein from said defendant Josephine Sooy-Smith, and which should be paid by the said defendant Josephine Sooy-Smith."

Defendant demurred to the complaint upon the ground that it does not state a cause of action. The demurrer being overruled, an answer was filed consisting of admissions and denials, and a counterclaim of $1,000 for the use and occupation of the premises.

Plaintiff demurred to the counterclaim and, although the demurrer was not directly passed upon, the court sustained objections to the admissibility of any evidence in support thereof. A reply having been filed a trial to a jury was had resulting in a verdict and judgment for plaintiff in the sum of $418.72, and both parties appealed.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Lincoln McCormack.*

For respondent there was a brief and an oral argument by *Mr. George M. Roberts.*

MR. JUSTICE BENSON delivered the opinion of the court.

1. We shall first consider the demurrer to the complaint, the overruling of which is assigned as error. This pleading was evidently framed and the cause was tried upon the theory that the purchaser of real property at an execution sale stands in the shoes of a mortgagee in possession, and is therefore entitled to recover from a redemptor the moneys necessarily expended by him in preserving the estate from loss and injury. If this theory were correct, we might hold the complaint sufficient to justify an accounting and recovery of such moneys as had been necessarily expended in the preservation of the estate; but, unfortunately, the purchaser at an execution sale does not bear such relation to the property, except in the sense that he may retain possession thereof until the redemptor has paid the sums specified in the statute. The true doctrine is thus expressed in 2 Jones on Mortgages (6 ed.), Section 1051b:

"If the purchaser at a foreclosure sale has paid the purchase money and there is a subsequent redemption, his rights are determined by treating him as a mortgagee in possession *to the extent of the price paid by him with interest,* and must account for the rents and profits."

The statute relating to redemption reads thus:

"The judgment debtor, or his successor in interest, may, at any time prior to confirmation of sale, and also within one year after confirmation of sale, redeem the property on paying the amount of the purchase money, with interest thereon at the rate of ten per cent per annum from the date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon": Section 248, L. O. L.

The case of *Higgs* v. *McDuffie*, 81 Or. 256 (157 Pac. 794, 158 Pac. 953), makes it clear that such redemption is not from the mortgage, but from the sale. If there were no statute, there could be no redemption. In *Doerhoefer* v. *Farrell*, 29 Or. 304 (45 Pac. 797), Mr. Chief Justice BEAN says:

"The right to redeem from an execution sale is a statutory right, and the court can neither increase nor lessen the burden of the redemptioner."

We have been unable to find any authority in conflict with this doctrine. We conclude, therefore, that the demurrer should have been sustained. If this works an injustice, and we think it does, the remedy lies with the legislature and not with the courts.

2. Considering defendant's cross-appeal we observe that the answer pleads a counterclaim of $1,000 as the reasonable value of the use and occupation of the premises during the time they were in the possession of the plaintiff. Under this plea, defendant offered evidence which was excluded by the trial court which ruling was assigned as error. It is stipulated that $166.89 was received by the plaintiff from the sale of fruit, but it does not appear from the stipulation that this is all that was received or that it is all that should have been received for the products of the orchard. Under this state of the record it was error to exclude the evidence offered. 2 Jones on Mortgages (6 ed.), Section 1122, contains the following statement of the correct practice:

"If a mortgagee himself occupies the premises, especially if they consist of a farm under cultivation, upon which labor and money must be bestowed to produce annual crops, he will be charged with such sums as will be a fair rent of the premises, without

regard to what he may realize as profits from the use of it."

3. Of course the plaintiff should be allowed to offset against such charge such sums as he may have expended in the care and cultivation of the property and moneys expended in protecting it from deterioration, together with the reasonable value of his own services in such work.

The judgment will be reversed and the cause remanded for further proceedings not inconsistent herewith. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Denied July 24, 1917.

PETITION FOR REHEARING.

(165 Pac. 1184.)

On petition for rehearing. Rehearing denied.

Mr. George M. Roberts, for the petition.

Mr. Lincoln M'Cormack, contra.

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

4. It will be remembered that this was an action by the assignee of a purchaser at a foreclosure sale to recover from the redemptioner the amount of money expended by the plaintiff in caring for and cultivating the orchard on the premises during his occupancy of the land. His total claim amounted to $1,074.45 and he credited upon it $166.89, the net amount he had re-

ceived from the sale of fruit grown there during the period he was in possession. Considering his demand, the court held in substance, speaking by Mr. Justice BENSON, that he had made the expenditures as a volunteer without any request either express or implied or arising by operation of law on the part of the defendant and, hence, there could be no recovery for them. The petition for rehearing earnestly presses upon us that, independent of the statute, the court should allow the expenses incurred by the plaintiff by analogy to the rule which has allowed the judgment debtor to recover for the rents, issues, and profits accruing between the sale and his own redemption of the premises. The reason for this favor extended to the one indebted on the decree is found in the statute in these words:

"If the judgment debtor redeem at any time before the time for redemption expires the effect of the sale shall terminate and he shall be restored to his estate": Section 249, L. O. L.

Beginning with *Cartwright* v. *Savage,* 5 Or. 397, the court has consistently held that this means complete restoration to the judgment debtor of his estate including as in that case what the purchaser had actually received from the realty while he had it in his custody. By the redemption the creditor has received his own with interest and such taxes as he may have paid on the holding during his occupancy. To allow him to take more out of the actual proceeds of the premises would be to sanction extortion permitting him to reap where he had not sown. By a Socratic argument in the *Cartwright Case* Mr. Justice MCARTHUR disposes of the matter thus:

"How can the property be said to be restored to its original condition, if, when redeemed, the judgment

debtor is obliged to take it back, denuded of the crops which he himself has sown, and which, but for the accidental circumstance that the sale was made just before harvest, he himself would have reaped?"

There is, therefore, statutory sanction for returning to the redemptioner the rents and profits accruing between sale and redemption for they are an inseparable adjunct of the estate which is restored to him. No counterpart to this is found in the Code by which the purchaser may pile up disbursements in operating the premises and charge them to the judgment debtor.

5. On the other hand the debtor cannot be permitted to make gain out of the purchaser where the latter has not increased his store because of his possession. Under the *Cartwright Case* and others like it we take it to be established as a principle that if a redemptioner would recover from the purchaser, it must be shown that the latter has actually collected rents due from a tenant whom he found in possession or has himself in very truth acquired net profits by reason of his having the land in charge. The statute gives the purchaser the right to the possession of the property from the day of sale until redemption, and that, too, without condition except as against waste as defined in Section 251, L. O. L., hence there can reasonably be no action by the redemptioner against the purchaser for mere use and occupation. The process of passing title by sale under a decree is not fulfilled until the delivery of the sheriff's deed. Pending this the purchaser holds the estate tentatively and must be prepared to restore it, not partly, but completely. He must deliver it without waste; but in the language of Section 251, L. O. L.,

"It shall not be deemed waste for the person in possession of the property at the time of sale, or entitled

to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to building thereon; or to use wood or timber on the property thereof; or for the repair of fences; or for fuel in his family while he occupies the property."

The expenses the purchaser incurs under this section are for his own benefit and he cannot charge them to the redemptioner. What more of substantial gain he makes out of the property follows the estate as part of it when it is restored to the redemptioner. All his disbursements perchance may come to naught when the redemptioner pays to the sheriff after due notice the amount of the bid plus interest and taxes paid. The utmost that can be said is that for actual profit the purchaser must account, but for no more.

It has been aptly said that we cannot add to the burdens of the redemptioner. Neither can we increase his benefits where none have accrued; and unless he can show that the purchaser while in possession has acquired a net profit there can be nothing due from the latter. In short, the purchaser cannot load upon the redemptioner an amount of expenses which would virtually improve the original owner out of his property. Neither can the latter recover from the former something not realized by the occupation of the premises in excess of the permissible waste allowed by Section 251, L. O. L. The language quoted in the former opinion from 2 Jones on Mortgages (6 ed.), Section 1122, refers to a mortgagee in possession to which situation it must be limited and must be distinguished from the condition where a purchaser has taken charge of the property under the statute. The one who buys

at a sale is a statutory personage, not a mortgagee in possession, although the twain have some common characteristics. When he invests his money it is subject to the legislative enactments governing that species of alienation and he cannot take more than is therein authorized, viz., the amount of his bid with interest and the taxes he has paid. Of course, in ascertaining whether or not there was a net gain the benefit of which accrues to the redemptioner, the matter of offsetting the expenses against the gross receipts might be involved. The conclusion is that the petition for rehearing must be denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Submitted on briefs July 21, affirmed July 24, 1917.

OREGON INV. & MORTGAGE CO. *v.* KELLER.

(166 Pac. 762.)

Judgment—Motion to Vacate—Affidavit for Service of Summons by Publication—Showing of Merits by Answer or Objections—Necessity for.

1. Where the affidavit of publication was not denied, and was in strict conformity with Section 58, L. O. L., a motion to vacate the default judgment on the ground that the paper in which the summons was published was not of such general circulation as prescribed by law was properly denied, where there was no affidavit supporting the motion or absolute showing of merits and no answer or other objection to the justice of the judgment.

[As to absolute right of defendant not personally served to have judgment opened and to defend, see note in **Ann. Cas. 1912A, 1164.**]

From Multnomah: CALVIN U. GANTENBEIN, Judge.

This is an action by the Oregon Investment and Mortgage Company, a corporation, against John Kel-

ler to recover judgment on money loaned the defendant. Defendant appealed from an order overruling motion to set aside default and judgment, unsupported by affidavit or tender of an answer. Affirmed.

In Banc. Statement by Mr. Justice Burnett.

The plaintiff commenced an action in the Circuit Court to recover money which it had loaned to the defendant. Upon an unchallenged showing, property of the defendant having been duly attached, the court made an order of publication and thereafter a default was entered and judgment rendered for the plaintiff according to the prayer of his complaint for want of an answer. The affidavit of publication declares that the "Oregon Deutsche Zeitung (German-American Daily) is a newspaper published daily and regularly at Portland, Multnomah County, State of Oregon, and of general circulation in such county and state." Nine days after judgment was rendered the defendant appeared by counsel and made the following motion:

"Comes now John Keller, through his attorney, L. W. O'Rourke, and respectfully moves the court for an order vacating the default and judgment heretofore entered in the above entitled case against John Keller, and in favor of the Oregon Investment and Mortgage Company, a corporation, dated April 14, 1917, upon the ground that the publication of the summons as shown by the affidavit of publication of summons is defective and of no account, by reason of the fact that the Oregon-Deutsche Zeitung (German-American Daily) is not a paper of such general circulation as is designated by law for the publication of summons and other legal notices."

The court overruled the motion and defendant appeals assigning as the sole error the denial of the application.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). AFFIRMED.

For appellant there was a brief over the name of *Mr. I. W. O'Rourke.*

For respondent there was a brief over the names of *Mr. Joseph Woerndle* and *Mr. C. T. Haas.*

MR. JUSTICE BURNETT delivered the opinion of the court.

There is no affidavit or other showing supporting the motion to vacate the default. In effect it is a demurrer to the evidence of publication embodied in the affidavit mentioned. That sworn statement directly says that the paper in question is a paper published and of general circulation in Multnomah County and the State of Oregon. It is a strict compliance with Section 58, L. O. L., which provides that a summons "may be published in any weekly or daily newspaper of general circulation, published in the county where the action, suit, or other proceeding is pending. * * " The affidavit is not denied. The sole question is as to the sufficiency of it. Inasmuch as it complies literally with the Code on that subject it is sufficient and the court was right in denying the motion to take off the default. Moreover, there is absolutely no showing of merits and no answer or other objection to the justice of the judgment was tendered. This is an essential feature in applications of this kind without which they must be disregarded: *White* v. *Northwest Stage Co.,* 5 Or. 99, 103; *Bailey* v. *Williams,* 6 Or. 71, 73; *Mayer* v. *Mayer,* 27 Or. 133, 135 (39 Pac. 1002); *Eagan* v. *North American Loan Co,.* 45 Or. 131 (76 Pac. 774, 77

Pac. 392); *Felts* v. *Boyer,* 73 Or. 83 (144 Pac. 420); *In re Marks' Estate,* 81 Or. 632 (160 Pac. 540). The judgment of the Circuit Court is affirmed.

AFFIRMED.

Argued July 11, reversed and remanded July 24, 1917.

STATE *v.* KEEP.*

(166 Pac. 936.)

Criminal Law—Manner of Pleading.

1. Under Sections 1467–1469, 1490, 1498, 1500, and 1501, L. O. L., prescribing practice as to pleading and demurring to an indictment, and providing that every plea must be oral and entered on the court's journal, stenographer's statement, preceding his report of the testimony, that at opening of trial defendant's counsel stated that defendant pleaded former acquittal of crime charged, is not proper evidence that plea was entered.

Criminal Law—Former Acquittal—Ingredient of Later Crime.

2. Where one from whom defendant has procured a note to be executed, secured by a mortgage on real estate to which the mortgagor has no title, by fraudulent representations sells it to another, defendant furnishing an abstract which he has changed so as to make it appear that mortgagor had title, he cannot, because of his prior conviction of conveying to mortgagor land in question without title, plead former acquittal to an indictment for obtaining money by false pretenses, since such conveyance was merely a preparatory crime not legally related to later crime nor an indispensable ingredient of it.

[As to former acquittal or conviction as a defense, see note in 11 **Am. St. Rep.** 228.]

Criminal Law—Former Acquittal—Ingredient of Later Crime.

3. The conviction of one crime will be deemed acquittal of another only where former transaction is necessarily involved, as a matter of law, as part of the subsequently completed crime.

Criminal Law—Nolle Prosequi.

4. Under Sections 1696, 1697, 1699, L. O. L., only misdemeanors may be compromised.

Criminal Law—Nolle Prosequi—Authority to Allow.

5. Under Sections 1704, 1705, L. O. L., district attorney cannot discontinue or abandon a prosecution for crime unless court, either

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*On necessity of consent of court to entry of *nolle prosequi* in a criminal case, see notes in 35 **L. R. A.** 705; 45 **L. R. A. (N. S.)** 1123.
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of its own motion or on application of district attorney, in furtherance of justice orders action dismissed.

Indictment and Information—Evidence Admissible Under Plea—Nolle Prosequi—Proof of Agreement.

6. Under Section 1505, L. O. L., providing that all matters of fact tending to establish a defense to a charge in the indictment, other than plea of former conviction or acquittal, may be admitted under plea of not guilty, defendant may prove, under that plea to an indictment for obtaining money under false pretenses, agreement with district attorney of another county that if he pleaded guilty to crime of making a conveyance without title, which conveyance was a preparatory step toward obtaining money by false pretenses, all other prosecutions growing out of that transaction would be dismissed.

Criminal Law—Nolle Prosequi—Authority to Allow.

7. District attorney has no authority to make agreement, binding on grand jury of another county, with one indicted for making conveyance without title, that if he pleads guilty all other prosecutions growing out of same transaction will be dismissed.

False Pretenses—Indictment—Description of False Token.

8. On trial for obtaining money by false pretenses, under Section 1964, L. O. L., by procuring another to sell note secured by mortgage on real estate to which mortgagor did not have title, evidence that defendant tampered with abstract so as to make it appear he did have it must be disregarded where indictment does not mention abstract.

False Pretenses—Sufficiency of Evidence.

9. Evidence that payee of note which defendant procured to be executed and delivered to him, and which was secured by mortgage on real estate to which mortgagor had no title, without authority from or knowledge of defendant induced another by fraudulent representations to buy it, retaining the proceeds, is insufficient to sustain conviction for obtaining money by false pretenses.

Criminal Law—Sufficiency of Evidence—Testimony of Accomplice.

10. One cannot be convicted of obtaining money by false pretenses on the uncorroborated testimony of an accomplice.

False Pretenses—Indictment—Variance.

11. Obtaining of money by false pretenses cannot, under Section 1541, L. O. L., be proven by oral representations accompanying use of false token, where latter is not pleaded in the indictment, but only by some note or memorandum of false pretense in writing, either subscribed by or in the handwriting of defendant.

From Multnomah: GILBERT W. PHELPS, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

A lengthy indictment in this case charges Joseph R. Keep jointly with William C. Borchers with the crime

of obtaining money from Frank Van Stralen by false pretenses. Borchers was discharged from the indictment so that he could be used as a witness for the state. Keep appeals from a conviction on a verdict of guilty.

REVERSED AND REMANDED.

For appellant there was a brief with oral arguments by *Mr. Wilson T. Hume* and *Mr. John A. Mears.*

For the State there was a brief over the names of *Mr. George Mowry,* Deputy District Attorney, and *Mr. Walter H. Evans,* District Attorney, with an oral argument by *Mr. Mowry.*

MR. JUSTICE BURNETT delivered the opinion of the court.

From the record we glean what may be deemed the salient facts in the matter involved. Keep was promoting an irrigation project in Wasco County, and needed money to meet his pay-roll. About that time, without having any title to the same, he conveyed some land to his daughter, Emma M. Janin, and her husband, E. C. Janin. The daughter and her husband made a promissory note payable to Borchers for $3,000, and likewise executed a mortgage on the tract securing the note. With the note and mortgage Keep applied to Borchers to raise the money for him. Borchers had $1,500 on deposit in a bank. He went there, gave his individual note for an additional $1,500, depositing the mortgage and note as collateral. He then took the money he borrowed, added it to his own deposit and drew out $3,000 which he delivered to Keep less $300 brokerage. About the time the Borchers note fell due he advertised the Janin collaterals for sale. Van Stralen saw the ad-

vertisement and entered into negotiations with Borchers for the purchase of them, but exacted an abstract of title to the land included in the mortgage. Borchers in turn demanded such a document from Keep, telling him he was about to sell the Janin note and mortgage. In a few days aftewards Keep furnished one to Borchers which other testimony tended to show was tampered with after it had been issued by the abstract company. Borchers handed this with the Janin papers to Van Stralen in exchange for a cashier's check for $3,000 with which Borchers redeemed his own note at the bank and placed the remainder on deposit to his account. It is not pretended that Keep received any part of the money with which Van Stralen parted, and it is written large throughout the record without controversy that Van Stralen had no transaction or conversation whatever with Keep and never saw him but once and then not to speak to him. It appears by an exemplification of the record that Keep was convicted on a plea of guilty of the crime of making conveyance without title in the Circuit Court of Wasco County, previous to the filing of the indictment in this case. He contends that he was induced to withdraw his plea of not guilty in that case and to enter one of guilty of making conveyance without title based upon his deed to the Janins by the promise of the district attorney there that if he would do so, all other prosecutions growing out of that transaction would be dismissed, and that he accepted the promise, pleaded guilty, and served his penitentiary sentence in pursuance thereof. In the instant case with his plea of not guilty he claims to have put in the additional plea of former acquittal and that the court erred in refusing to allow him to give evidence of the alleged agreement with the state's representative in Wasco County.

1. We inquire first whether there is any authentic record of the plea of former acquittal. On arraignment, if the defendant require it, he must be allowed until the following day, or such other time as the court may deem reasonable, to answer to the charge. At the time appointed he may move the court to set aside the indictment or may demur or plead thereto. If he refuses to do either the court must enter a plea of not guilty for him. Both the demurrer and plea must be entered in open court either at the arraignment or at such other time as may be allowed the defendant for that purpose. If the demurrer be disallowed the court must permit the defendant at his election to plead, which he must do forthwith, or at such time as the court may allow: Sections 1467, 1468, 1469, 1490, 1498, L. O. L. There are three kinds of pleas, to wit, guilty, not guilty, and a former judgment of conviction or acquittal of the crime charged which latter may be interposed either with or without the plea of not guilty. Every plea must be oral and must be entered in the journal of the court: Sections 1500, 1501, L. O. L. The latter section prescribes the only official means by which we may ascertain the defenses offered by the defendant. The record before us of the court's transactions contains no mention whatever of a plea of former acquittal. The only allusion to such a thing is found in the stenographer's declaration, preceding his report of the testimony which is attached to the bill of exceptions, that when the trial began the defendant's counsel stated

"the defendant, Joseph R. Keep, pleads that he has already been acquitted of the crime charged in the indictment in the circuit court for Wasco County, Oregon, on the 22d day of July, 1913."

Strictly speaking, in the light of the statute we cannot regard this as proper evidence that such a plea was entered. Passing this, however, we proceed to consider the matter upon its merits.

The contention of the defendant seems to be that as a matter of law the false conveyance by Keep to the Janins was a necessary part of the plot to obtain the money from Van Stralen and that while the state was entitled to carve out of the whole transaction as great a crime as possible it could carve but once and having convicted him of an essential part of the scheme it operated as an acquittal of all its other factors. It appears also to be his position that his dealings with the district attorney constituted a compact binding upon the state so that all the sequelae of the bogus deed were thereby obliterated. It is proper to state that the law officer of the state in Wasco County stoutly denies that any such agreement was made.

2, 3. In the first place the making of the deed to Janin was at best a mere preparatory crime and is not included in the subsequent offense of obtaining money under false pretenses. We might as well say that because a man was convicted of stealing from a blacksmith-shop a sledge-hammer and drill with which he afterwards robbed a bank safe, he should be immune from prosecution for the crime committed in the bank. It is only where the former transaction is necessarily involved as a matter of law as part of the subsequently completed crime, that the conviction of one will be deemed the acquittal of the other. However much it may be connected in point of fact the making of conveyance to Janin without having title bears no legal relation to the subsequent getting of the money from Van Stralen and the conviction of the former does not bar prosecution for the latter. The making of the

deed was not an indispensable ingredient of the crime of obtaining money under false pretenses. All allusion to it properly might have been left out of the testimony. The manufacture of bogus documents might have begun with the mortgage alone without reference to the conveyance.

4–7. Moreover, only misdemeanors may be compromised: Sections 1696, 1697, 1699, L. O. L. It is said in Section 1705, L. O. L.:

"The entry of a *nolle prosequi* is abolished; and the district attorney cannot discontinue or abandon a prosecution for a crime, except as provided in the last section,"

which latter is to the effect that the court either of its own motion or upon the application of the district attorney and in furtherance of justice may order an action after indictment to be dismissed. No such action of the court in the premises is offered in evidence. The defendant's only attempt was to prove the alleged treaty with the prosecuting officer. Even if this were admissible at all it could have been given in evidence under the plea of not guilty, under Section 1505, L. O. L., which is in purport that all matters of fact tending to establish a defense to a charge in the indictment other than the plea of former conviction or acquittal may be given in evidence under the plea of not guilty. The district attorney, however, had no authority to make any such agreement. He could not control the subsequent action of a grand jury in that county and much less in Multnomah County. Knowing the law as he must be presumed to have known it, the defendant was aware of the lack of authority on the part of the prosecuting officer. It may be true that he served his sentence consequent upon his plea and that perhaps

on proper showing to the court the conviction could have been set aside on account of the undue influence used to induce him to plead guilty; but that matter is *coram non judice*. The matter of former acquittal, therefore, must be laid out of the case.

8. As stated, the indictment is for obtaining money under false pretenses, of which it recites six: (1) That Janin and his wife were the owners of the land on November 15, 1912, the date of the mortgage; (2) that the mortgage was a valid lien thereon; (3) that the note represented an actual indebtedness from Janin to Borchers; (4) that the assignment by Borchers to Van Stralen was an actual *bona fide* assignment and transfer of a real promissory note and mortgage; (5) that Borchers was the lawful owner of the note and mortgage; and (6), that there was $3,000 due on the note and mortgage. No mention is made in the indictment of the abstract said to have been furnished by Keep to Borchers and by the latter delivered to Van Stralen. The indictment is framed under Section 1964, L. O. L., reading thus:

"If any person shall, by any false pretenses, or by any privy or false token, and with intent to defraud, obtain, or attempt to obtain from any other person, any money or property whatever, or shall obtain or attempt to obtain with the like intent the signature of any person to any writing the false making whereof would be punishable as forgery, such person, upon conviction thereof, shall be punished. * * "

It is also said in Section 1541, L. O. L.:

"Upon a trial for having, by any false pretense, obtained the signature of any person to any written instrument, or obtained from any person any valuable thing, no evidence can be admitted of a false pretense expressed orally and unaccompanied by a false token or writing; but such pretense, or some note or memoran-

dum thereof, must be in writing, and either subscribed by or in the handwriting of the defendant. * * ''

Adverting to Section 1964, it is apparent that the crime may be committed in two ways: (1) by the use of any false pretenses; and (2) by any privy or false token: *State* v. *Whiteaker,* 64 Or. 297, 302 (129 Pac. 534, 536). The indictment is based upon the first of these, charging the defendant with obtaining money by false pretenses and not by the use of any privy or false token. As laid down by Mr. Chief Justice WOLVERTON, in *State* v. *Renick,* 33 Or. 584 (56 Pac. 275, 48 Cent. Law Journal, 390, 72 Am. St. Rep. 758, 44 L. R. A. 266), ''it is necessary to specify the false token in the indictment,'' citing 2 Wharton, Criminal Law, 1129. Whether or not, therefore, the abstract said to have been given to Borchers by Keep was bogus or had been tampered with and so amounted to a false token must be disregarded because it is not mentioned in the indictment. With it goes the only trace of Keep's liability in the matter for all that is attributed to him is that he furnished the abstract to Borchers. As pointed out further on it could only amount to a false token, not a false pretense, and there is no statement in the indictment of any false token.

9. Still, further, referring to the matter of false pretenses, as already mentioned no communication whatever was had between Keep and Van Stralen. The entire transaction by which Borchers induced the latter to part with his money was conducted by Borchers himself; and for his own benefit exclusively. It was important for him to raise the money with which to pay his own note to the bank. It is not pretended that he was securing funds for any of Keep's purposes and it is not intimated that Keep ever received any part of it. All the declarations made to Van Stralen

were uttered by Borchers in the absence of Keep and, so far as the testimony shows, without the semblance of his authority. No assent of Keep to the delivery of any of the papers by Borchers to Van Stralen is shown by the record. In brief, Borchers, having by virtue of a former transaction secured control of papers which might under some circumstances be incriminative of Keep, the former used them for his own advantage without authority from the latter. To sustain a conviction under such circumstances would be to say that Borchers might multiply criminal acts of the present defendant as often as he could negotiate a sale or pledge of the papers, all without Keep's knowledge or co-operation.

10. Van Stralen and Borchers testified concerning the transaction with each other. Another witness, Bolton, gave evidence about Keep having obtained an abstract from him and on the subject of alleged changes having been made in that document. Janin related the execution of the note and mortgage and his reception of the deed from Keep. This was substantially all the testimony of witnesses for the state and was received over the objection of the defendant as to the narrations of Borchers and Van Stralen that the declarations of Borchers were made in the absence of the defendant and without any showing of his consent or authority to make them, and that there was no testimony to corroborate Borchers who was an accomplice, as the defense contends. At the close of the testimony for the state the defendant moved to strike out all this testimony; but the motion was denied. A motion for a directed verdict was also denied. It is plain that Borchers was either an innocent agent, if such a term may be employed, or an accomplice. A criminal may engage in the accomplishment of his purpose someone

who has no knowledge of the unlawful business and who may innocently carry out the criminal enterprise designed by the defendant. There is, however, no line of testimony showing in any manner that Keep authorized any transaction between Borchers and Van Stralen. Borchers, therefore, cannot be held up as an innocent agent of Keep. On the contrary all the testimony is to the effect that he was acting for himself for the purpose of raising money with which to pay his own note and to reimburse himself for what he had already delivered to Keep on the former transaction. Viewing Borchers as an accomplice on the other hand there is nothing to corroborate his testimony respecting Keep. The motion to strike out the state's evidence as indicated should have been allowed.

11. Still further, considering the fact that the statute is aimed against two methods of committing the crime in question, namely, by means of false pretenses, as well as by means of any privy or false token, and remembering that there is no allegation of any false token, it is plain that under Section 1541, L. O. L., the false pretense, as such, must be proved by some note or memorandum thereof in writing and either subscribed by or in the handwriting of the defendant. The principle is that if the prosecutor would rely upon a false token he must plead it. He may then prove the oral representations accompanying the use of the token as a means of accomplishing the fraud. On the contrary if he pleads a false pretense he must sustain it by the only proof admissible under the statute which is some note or memorandum thereof in writing subscribed by or in the handwriting of the defendant. The state cannot allege one species of the offense and undertake to prove another. It is hornbook law that the proof must correspond to the allegations. Referring again to the averment of the false pretenses, there is no

writing whatever on the part of Keep introduced in evidence in the case. Within the meaning of the statute he made no provable pretenses on the subject charged in the indictment. The nearest approach to proof of this was an exemplification of the record of the deed from Keep to the Janins, but that was typewritten except the signature of the authenticating officer. That certified copy and the abstract were the only writings in evidence containing even the name of Keep. So far as the case before us is concerned the jury never saw a specimen of the handwriting or signature of Keep. The testimony was therefore wholly insufficient to justify conviction of the defendant of the offense as charged. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued July 11, decided July 24, 1917.

STATE v. HOFFMAN.

(166 Pac. 765.)

Jury—Qualifications—Credibility of Witnesses.

1. In a nuisance prosecution for selling intoxicating liquors, the state cannot question prospective jurors regarding their prejudice against the testimony of witnesses obtaining information solely for purposes of prosecution.

[As to the bias or prejudice or interest that disqualifies a juror, see note in 9 **Am. St. Rep.** 744.]

Intoxicating Liquors—Criminal Prosecution—Sufficiency of Evidence.

2. In a nuisance prosecution for selling intoxicating liquors, testimony of a so-called informer employed for the express purpose of procuring evidence, who was corroborated to some extent, warrants a conviction.

Intoxicating Liquors—Criminal Prosecution—Return of Seized Liquors.

3. Under Laws of 1915, page 150, providing for one complaint and warrant upon which are based distinct proceedings for maintaining

a nuisance and a proceeding *in rem* against the seized liquors, the court cannot order the seized liquors returned to defendant upon his acquittal on the nuisance charge.

From Multnomah: HENRY E. MCGINN, Judge.

Department 1. Statement by MR. JUSTICE BENSON.

The district attorney for Multnomah County filed a complaint in the District Court for said county charging the defendant with "unlawfully keeping and maintaining a place as a common nuisance," by keeping for sale, barter and delivery, in violation of law, certain intoxicating liquors at number 890 East Yamhill Street, Portland. The title of the court and cause as found in the complaint, reads thus:

"*In the District Court of the State of Oregon for the County of Multnomah.*

STATE OF OREGON,
vs.
GEO. L. HOFFMAN, Defendant.

Misdemeanor.

Chapter 141, General Laws of Oregon, 1915."

Thereafter, on the same day, a warrant of arrest, search and seizure was issued under the following caption:

"*In the District Court of the State of Oregon for the County of Multnomah.*

STATE OF OREGON,
vs.
JOHN DOE, Whose True Name is Unknown,
Defendant.

Warrant for Search and Seizure and Arrest."

The return of the sheriff discloses that by virtue of this warrant he searched the premises described

therein, seized a considerable quantity of liquors, and "pursuant to the within order, arrested John Doe (George Hoffman) in the county of Multnomah, the keeper thereof, and I have him now in custody before the court." The defendant entered a plea of not guilty, a trial was had resulting in a conviction from which the defendant appealed to the Circuit Court where, upon a trial to the jury, there was a verdict of acquittal and judgment discharging the defendant and directing the sheriff to return to him the liquors which had been seized at the time of the arrest. From this judgment the state appeals.

For the State there was a brief over the names of *Mr. Thomas G. Ryan,* Deputy District Attorney, *Mr. Walter H. Evans,* District Attorney, and *Mr. George Mowry,* Deputy District Attorney, with an oral argument by *Mr. Ryan.*

For respondent there was a brief over the name of *Messrs. Manning, Slater & Leonard,* with an oral argument by *Mr. John Manning.*

MR. JUSTICE BENSON delivered the opinion of the court.

This appeal is taken under the authority of Section 34 of Chapter 141, Laws of Oregon, 1915, which reads as follows:

"An appeal to the supreme court may be taken by the state from the judgment or order of the circuit court in all cases arising under this act, upon a judgment for the defendant quashing the indictment, or upon a judgment of acquittal entered on a verdict, whether ordered by the court or otherwise, for the purpose of determining questions of law, but not for the purpose of obtaining a new trial; but nothing in this section contained shall be construed to abridge any

right of appeal which the State may have otherwise under the criminal laws of this State."

1. The first assignment of error challenges the ruling of the court in refusing to allow the prospective jurors, upon their *voir dire,* to answer this question:

"If, in a prosecution for unlawfully selling intoxicating liquors or for keeping intoxicating liquor for unlawful sale, a portion of the evidence produced by the state should consist of the testimony of what is commonly known as an informer, namely, a person whose testimony is to the effect that he bought intoxicating liquor for the sole purpose of securing evidence against the seller, have you any such prejudice against testimony of that class or against witnesses of that class, or against cases in which such testimony is used, as would prevent you from giving a fair, just and impartial verdict in such a case?"

It will be noted that the question goes to the juror's opinion of the credibility of "informers" as witnesses. In the case of *Jenkins* v. *State,* 31 Fla. 196, 198 (12 South. 677), a juror was asked this question:

"Is your mind in such a state that you would or could give the evidence of an Ethiopian or descendant of the African race the same weight that you would that of a Caucasian or descendant of the white race, in rendering a verdict upon this case?"

Mr. Justice TAYLOR speaking for the court says:

"This question was not at all a proper one to be put to a juror on the *voir dire,* as it did not seek or tend to demonstrate the juror's bias for or prejudice against the prisoner, but was an effort to make the juror, in advance of the production of evidence in the cause, disclose what class of witnesses he would or would not give credence to. A field of inquiry that is not proper to be gone into in testing the qualification of jurors on the *voir dire.* To illustrate its impropriety: Suppose the prisoner's counsel has put this question to the

jury; 'John Doe, who is a white man, and Richard Roe who is a colored man, will be witnesses in this case: Richard Roe the colored man will be the defendant's witness, Doe will be the witness against him—will you, or can you give as much credence or weight to Roe's evidence as to that of Doe in rendering your verdict? Should the juror answer that Doe's would weigh the strongest with him, it would not demonstrate any element of incompetency, bias or prejudice in the juror *as such* to sit in judgment on the prisoner's case, but, such an answer from the juror would only demonstrate the ill fortune of the prisoner in having Roe for a witness, or rather in not having some one else as a witness more creditable than Roe."

In *State* v. *Holedger,* 15 Wash. 443 (46 Pac. 652), objections were sustained to the following questions:

" 'Would you attach more importance or credibility to the word of a preacher outside of court than any other gentleman,' and * * 'Would you attach more credence to the testimony of Dr. McInturff, a minister of the gospel, than that of any one else?' "

The court speaking through Mr. Justice DUNBAR dismisses the assignment of error with these words:

"These questions are so apparently improper and irrelevant that we do not feel called upon to enter into discussion of them."

The question in the case at bar, while more skillfully framed than those quoted, is in the same class so far as the purpose and result are concerned and we think the trial court did not err.

2. Our attention is next called to the action of the court in directing a verdict for the defendant. This ruling was based upon the theory that the state has no right to employ a witness to purchase liquor from a defendant for the express purpose of securing evidence upon which to base a prosecution for violation of law. The trial court expressed its views thus:

"The court's ruling is that when the state encourages a person to commit a crime, it cannot take advantage of its own wrong."

The evidence discloses that a witness named Hammond, employed by the state as a detective, purchased from defendant the liquor upon which the criminal proceeding is based. There was also other evidence in corroboration. Our attention has not been called to any authorities supporting the position taken by the trial court and, in an independent investigation, we have been unable to find any. On the contrary, in *State* v. *Barber,* 2 Kan. App. 679 (43 Pac. 800, 802), in a similar case the Kansas Court of Appeals says:

"And, finally, the defendant asks this court to reverse the judgment, and order a new trial, on the ground that the only witness who testified to the particular sale of which the defendant was convicted admitted, upon cross-examination, that he had been furnished the money with which to make the purchases testified to by him; that he at that time expected to be used as a witness against the defendant; that he had been hired to make the complaint, and to become a witness; that he cared nothing about the enforcement of the law; and that, in making the complaint and becoming a witness in this case, he was prompted solely by the money which had been promised him by others. In other words, this court is asked to declare, as a matter of law, that such a witness is unworthy of belief, and that the defendant should not be deprived of his liberty, property, or reputation on the unsupported testimony of a 'spotter', although such evidence was uncontradicted, and no attempt was made to impeach the witness, save by showing the motives which prompted him to do what he did towards securing the conviction of the defendant. The trial court was not requested to submit to the jury an instruction embodying that proposition, and we know of no law which would have authorized such an instruction. Neither do we know of any precedent which we might follow, were

we to declare the rule to be as argued, even if we entertained the views expressed by counsel."

This court has adopted the same view in *State* v. *Emmons,* 63 Or. 535 (127 Pac. 791). Therefore the trial court erred in directing a verdict of acquittal.

3. Finally, it is urged that the court had no jurisdiction to order the liquors seized under the warrant to be returned to the defendant. This proceeding is based upon the provisions of Chapter 141, Laws of Oregon, 1915. Section 15 of the act declares that all places where intoxicating liquors are manufactured, sold, bartered or given away, in violation of law, and all intoxicating liquors kept for sale, barter or delivery, in violation of law, are common nuisances. Sections 20, 21 and 22 of the act prescribe the procedure for punishing the keeper and destroying the liquors, and are as follows:

"Upon the filing of a complaint, information or indictment charging that a place is kept or maintained as a common nuisance by any person or persons, and that intoxicating liquors, bottles, glasses, kegs, pumps, bars or other property are kept or used therein in keeping and maintaining such place as a common nuisance, a warrant shall be issued commanding the officer to whom it is directed to arrest the person or persons charged or described as the keeper or keepers, and to search the place described in such complaint, information or indictment, and to seize and take into his custody all intoxicating liquors, glasses, bottles, kegs, pumps, bars or other property described in said complaint or information which he may find at such place, and safely keep the same subject to the orders of the court. The complaint or information shall be supported by oath or affirmation and shall describe the place to be searched with sufficient particularity to identify the same, and shall describe the intoxicating liquors, or other property alleged to be used in main-

taining the same, as particularly as practicable, but any description, however general, that will enable the officer executing the warrant to identify the property to be seized, shall be deemed sufficient. Upon the return of the warrant, the court shall proceed as in other cases against the person or persons arrested: Section 20.

"Whenever any intoxicating liquor or other property shall be seized under such a warrant, whether an arrest has been made or not, a notice shall issue within forty-eight hours after the return of the warrant in the same manner as a summons, directed to the defendant or defendants in such action, and to all persons claiming any interest in the intoxicating liquors, or other property, and fixing a time not less than five days from the service thereof and a place at which any and all persons claiming any interest therein may appear and answer the complaint made against such intoxicating liquors or other property, and show cause, if any they have, why the same shall not be adjudged a nuisance and ordered destroyed. Such notice shall be served upon the defendant or defendants in such action in the same manner as a summons, if they be found within the jurisdiction of the court, or otherwise by publication according to the laws governing publication of summons in civil suits, and a copy thereof shall also be posted in a conspicuous place upon the premises where such property was seized. If, at the time for filing answer, such notice has not been duly served, or other sufficient cause appear therefor, the time for answering may be by the court extended and such other notice issued as will supply any defect in the previous notice and give reasonable time and opportunity for all persons interested to appear and answer. At or before the time fixed by notice, any person claiming an interest in the intoxicating liquors, or other property seized, may file his answer in writing, setting up his claim thereto, and shall thereupon be deemed a party defendant to the proceedings against such liquor or other property. The complaint or information and answer or answers

that may be filed shall be the only pleadings required; and at the time fixed for answer, or any other time then to be fixed by the court, a trial shall be had in a summary manner before the court, sitting without a jury, of the allegations of the complaint or information against the liquor or other property seized; and whether any answer shall be filed or not, it shall be the duty of the district attorney to appear and adduce evidence in support of such allegations.

"If the court shall find that said intoxicating liquors or other property, or any part thereof, were, at the time the complaint or information were filed, being used in maintaining a common nuisance, he shall adjudge forfeited so much thereof as he may find was being so used, and shall order the officer, in whose custody it is, publicly to destroy the same, and such officer shall make a return thereof to the court in which such action is pending, showing that he has complied with the said order so made and entered. So much of the intoxicating liquor or other property as the court shall not find to have been used in maintaining a common nuisance he shall order returned by the officer, in whose custody it is, to the place or as near as possible to the place from which it was taken, or delivered to the person establishing his claim to the same. If the court shall find that any of such liquors or other property was, at the time the complaint or information was filed, being used in maintaining a common nuisance, and also find that it was being used by any person served with the notice provided for in the previous section of this act, or by any person filing an answer, as in said section provided, so that it was then owned or claimed by any such person and by him knowingly allowed to be so used, the court shall render judgment against such person for the costs of the proceedings against the intoxicating liquors or other property so used or owned by him. If the court shall not find that any of the said intoxicating liquors or other property seized was, at the time the complaint or information was filed, being used in maintaining a common nuisance, or shall not find that any of it was being so used,

or so owned and allowed to be used, by any person served with the notice aforesaid, or voluntarily becoming a party as aforesaid, the costs of the proceedings against such property shall be paid as in criminal cases. Either the state, or any defendant or other person claiming the property seized, may appeal from the judgment of the court in any such special proceeding against property seized, in the manner provided for the taking of appeals in criminal cases, except that the appeal must be taken within ten days unless the time be extended by the court, for good cause shown; and any claimant of such property who appeals, in order to stay the proceedings, must give an undertaking with two or more sureties to the State of Oregon, to be approved by the trial court, in a sum of not less than $100 nor less than double the costs adjudged against him, conditioned that he will prosecute his appeal without unnecessary delay, and that if judgment be rendered against him on appeal, he will satisfy such judgment and costs. No bond shall be required for an appeal by the State, and such appeal shall stay the execution of judgment'': Section 22.

It will be seen at once that there is but one complaint and one warrant upon which are based two distinct proceedings. One against the keeper for the misdemeanor involved in maintaining the nuisance and, the other, a proceeding *in rem* against the liquors. The last sentence of Section 20 says:

"Upon the return of the warrant, the court shall proceed as in other cases against the person or persons arrested."

Section 21 provides for condemnation proceedings against the liquors in a separate action upon the same complaint, but with different answers, and, if the circumstances of the particular case warrant it, with different parties, and upon this branch of the case the property is either destroyed or returned to the owner as the facts disclosed upon the trial may indicate. The

case before us for present consideration is the criminal action against the keeper and when it was taken by appeal from the district court, the proceeding *in rem* did not accompany it.

The state of Maine has a somewhat similar statute, enacted in 1858, and the Supreme Court of that state in the case of *State* v. *Bartlett,* 47 Me. 388, 395, says:

"The statute, c. 33, laws of 1858, under which the liquors in controversy were seized, contemplates that liquors may be found in the custody of one person, but may be owned and intended to be used for lawful or unlawful purposes by other persons. It therefore provides for the punishment of the persons who kept or have in their possession liquors with intent to sell the same unlawfully. It also provides that the owner of the suspected liquors, or those entitled to their possession, may come in and defend them against the charge of being intended for sale in violation of law.

"These two proceedings, though originating in the same preliminary charge, are, in the end, entirely distinct. One terminating in a judgment in which the status of the liquors is determined; the other, in a judgment, in which the guilt or innocence of the party having such liquors in custody is determined."

This excerpt is a very clear exposition of our own statute. In the case at bar, the only question which was before the Circuit Court was the guilt or innocence of George L. Hoffman, and the order for the return of the liquors was without jurisdiction and therefore void.

If the other branch of the proceeding is still pending in the District Court, as we understand that it is, there is nothing to prevent that court from disposing of it.

The question of the effect of the judgment of acquittal in this case is not before us and we do not undertake to decide whether it is a bar to the action against the liquors. Neither do we pass upon the

problem as to whether a "John Doe" warrant of search and seizure, issued upon a complaint which discloses the true name of the keeper, will justify such search and seizure.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Submitted on briefs July 17, affirmed July 31, 1917.

LEEFIELD v. LEEFIELD.*

(166 Pac. 953.)

Marriage—Persons Who may Marry—Consanguinity.

1. Marriage between first cousins consummated outside the state of residence for the purpose of evading its laws will not be annulled in this state, regardless of whether it was unlawful in state where consummated, notwithstanding Section 7017, L. O. L., prohibiting such marriage, Section 2098, declaring it punishable by imprisonment or fine, and Section 502, declaring it void if solemnized within the state, since latter section is impliedly to the effect that, if a marriage between prohibited persons is solemnized in another state, the marriage is valid in this state irrespective of whether or not it is of any binding force in state where nuptial is celebrated.

[As to validity of marriage solemnized outside of state, see note in 18 **Am. Rep.** 521.]

Divorce—Grounds—Statute.

2. Divorce can be granted only for reasons specified in Section 507, L. O. L.

From Josephine: FRANK M. CALKINS, Judge.

In Banc. Statement by MR. JUSTICE MOORE.

This is a suit by Otis D. Leefeld against Elizabeth M. Leefeld to have a marriage declared void. The defendant, though personally served with summons and a certified copy of the complaint, failed to demur, plead

*On the question of incestuous marriage as void or voidable, see note in **L. R. A.** 1916C, 723. REPORTER.

or answer. Whereupon the district attorney of the proper county appeared on behalf of the state. From the evidence received at the trial findings of fact were made as follows:

"The court finds that the plaintiff and defendant are now and have been inhabitants of the State of Oregon for the period of one year immediately preceding the commencement of this suit; that plaintiff and defendant entered into a marriage at Vancouver, Washington, on or about October 1, 1902; that no children have been born the issue thereof; that plaintiff and defendant are full first cousins; that at the time of said marriage plaintiff and defendant were citizens and residents of Oregon, and that they went from Oregon to the State of Washington and contracted said marriage in said last named state for the purpose of evading the laws of Oregon, and that they each believed that they had thereby contracted a valid marriage, and they thereafter returned to and have since resided in Oregon."

As a conclusion of law the court further found:

"That said marriage was and is valid."

A decree having been rendered dismissing the suit the plaintiff appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the name of *Mr. Oliver S. Brown.*

For the State there was a brief over the name of *Mr. W. T. Miller,* District Attorney.

MR. JUSTICE MOORE delivered the opinion of the court.

1. No testimony given at the trial has been sent up, and hence the only question to be considered is whether

the findings of fact as made support the conclusion of law and the decree based thereon. Provisions of law applicable to the case at bar are:

"Marriage is a civil contract": Section 7016, L. O. L.

"The following marriages are prohibited: * * 2. When the parties thereto are first cousins or any nearer of kin to each other, whether of the whole or half blood, computing by the rules of the civil law": Section 7017, L. O. L.

"If any persons, being within the degree of consanguinity within which marriages are prohibited by law, shall intermarry with each other * * such persons or either of them, upon conviction thereof, shall be punished by imprisonment in the penitentiary * * or * * in the county jail * * or by fine"; Section 2098, L. O. L.

"All marriages which are prohibited by law, on account of consanguinity between the parties * * shall, if solemnized within this state, be absolutely void": Section 502, L. O. L.

In *McIlvain* v. *Scheibley,* 109 Ky. 455, 59 S. W. 498, which was a suit by an alleged widow to recover dower, the answer substantially averred that the plaintiff was the niece of her deceased alleged husband, both of whom had resided in Kentucky, but in order to evade the laws thereof prohibiting marriages between persons of that degree of consanguinity they went to Tennessee for the sole purpose of entering into a marriage contract, setting forth provisions of the Code of the latter state inhibiting marriages between such persons; and that after the ceremony was performed the parties returned to Kentucky, where they were legally domiciled when he died. The plaintiff, renouncing the provisions of his last will and testament in her behalf, undertook to recover the allowance which the law of Kentucky made in such cases out of the lands and tene-

ments of the decedent for her support and maintenance. It was ruled that under Section 5646 of the Code of Tennessee, interdicting a man from marrying his niece and declaring that any person who should violate such provision would be guilty of incest and punished therefor by imprisonment in the penitentiary, rendered a marriage between such persons void *ab initio*, and that the woman was not entitled to dower out of the decedent's estate. In deciding that case it is said:

"It is true that the Tennessee statute does not expressly say that a marriage between uncle and niece is void, but it does expressly prohibit such marriages, and provides that persons violating the law shall be guilty of felony, and confined in the penitentiary for a number of years. Hence it seems to us that, taking the statutes relating to such marriages, the necessary meaning and intent were to render such marriages absolutely void. It would be strange, indeed, if a marriage could have any validity, and yet the parties by continuing the marriage relation would be guilty of a felony, and constantly liable to be convicted and sentenced to the penitentiary."

It would appear that the provision of the Code of Tennessee thus referred to was similar to Sections 7017 and 2098, L. O. L., which latter enactments might possibly be controlling in this state in a case of this kind if it were not for Section 502 of our Code, which is impliedly to the effect that if a marriage between prohibited persons is solemnized in another state, the union thus formed is valid in Oregon irrespective of whether or not it is of any legal or binding force in the state or county where the nuptial is celebrated. Section 502 seems to have been enacted on the assumption of a legislative recognition that men and women of the classes specified who were prohibited from marrying each other in Oregon might possibly be permitted

legally to enter into that relation in some other state or country, and that if the union thus formed were valid where it was consummated, it would be regarded as legal in this state, thereby imposing upon the state or country where the wedding occurred the duty of convicting and punishing such persons if they violated the *lex loci contractus*. That such a construction of the statute might, as in this instance, induce prohibited persons temporarily to leave Oregon in order to evade the laws thereof and go to some other state to consummate a marriage which if celebrated in this state would be void is a legislative question with which the courts have no right to meddle.

In *Sturgis* v. *Sturgis*, 51 Or. 10, 15 (93 Pac. 696, 131 Am. St. Rep. 724, 15 L. R. A. (N. S.) 1034), it is said:

"The rule as gathered from the authorities seems to be that in general a marriage valid where solemnized is valid everywhere, not only in other states generally, but in the state of the domicile of the parties, even when they have left their own state to marry elsewhere for the purpose of avoiding the laws of the state of their domicile. There are two exceptions to this rule, viz., marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication, viz., such as are prohibited by Section 5217, B. & C. Comp. (L. O. L., Section 7017)."

The language thus employed was evidently used by way of illustration and comparison only for the question there considered was the marriage of a ward without the consent of the guardian. It is further said in the opinion:

"The marriage in this case does not come within the first exception, as being contrary to the law of nature

as generally recognized in Christian countries, such as polygamy or those involving incest; neither is it one specially prohibited by our statutes: Section 5217, B. & C. Comp. (L. O. L., Section 7017). Nor does our statute contemplate that such marriages as the one involved here shall be deemed void, but, if in violation of the statute, are only voidable."

Whether the statutes of the State of Washington prohibit marriages between first cousins will not be considered for no reference is made in the complaint to the Code of that state. Nor was it necessary to do so on the assumption that a marriage valid where celebrated is valid everywhere for the wedding of the parties not having been solemnized in this state cannot be decreed void by a court in Oregon in a suit instituted for that purpose: Section 502, L. O. L.

Though the question is not now involved it would nevertheless seem that in order to justify a conviction an indictment charging the crime of marriage of first cousins should allege that the nuptial rites were solemnized within this state subsequent to May 19, 1893, when the statute went into effect amending Section 2853, Hill's Ann. Laws Or., so as to prohibit for the first time the marriage of persons of that degree of consanguinity. Upon this subject, however, see the case of *State* v. *Nakashima,* 62 Wash. 686 (114 Pac. 894, Ann. Cas. 1912D, 220).

2. A divorce can be granted only for the reasons specified in the statute: Section 507, L. O. L.; *Weber* v. *Weber,* 16 Or. 163 (17 Pac. 866). A marriage of first cousins when solemnized in another state or country is not thus interdicted, and as the wedding of the parties hereto was not celebrated in Oregon, the decree must be affirmed and it is so ordered. AFFIRMED.

Submitted on briefs May 19, reversed and judgment rendered June 19, motion to recall mandate filed July 16, allowed July 31, 1917.

RINER *v.* SOUTHWESTERN SURETY INS. CO.*

(165 Pac. 684; 166 Pac. 952.)

Insurance—Indemnity Insurance—Bad Faith.

1. Where an indemnity insurance policy provided that no action shall lie against the company for any loss or expense under the policy unless for loss or expense actually paid in satisfaction of a final judgment within 90 days from the date of the judgment and after trial of the issue, actual satisfaction of a judgment by the delivery and acceptance of a note did not amount to bad faith, although the insured and his attorneys knew that their satisfaction of the judgment would enable them to compel the insurance company to pay the amount of the judgment.

Insurance—Indemnity Insurance—Satisfaction of Judgment—Evidence—Sufficiency.

2. In an action on a policy of indemnity insurance to recover the amount of a loss sustained and paid in satisfaction of a judgment in favor of an injured employee in which it appeared that the judgment was satisfied by the delivery and acceptance of a note, evidence *held* to show that the judgment was in truth satisfied, and that the note was actually given and accepted in payment of the judgment, and that it was clearly intended and understood that the note extinguished the judgment, and that the parties acted in good faith without any agreement that any step in the transaction should be considered in any way different from its outward appearance.

Evidence—Presumptions—Failure to Produce Witness.

3. In an action on a policy of indemnity insurance to recover the amount of loss sustained and paid in satisfaction of a judgment in favor of an injured employee by delivery of a note, where it appeared that the defendant knew of the whereabouts of such employee, it is not in a position to claim that the failure of the employee to appear as a witness for plaintiff argues bad faith.

[As to failure to call witness as raising presumption against party to action, see note in **Ann. Cas.** 1913D, 559.]

Payment—Sufficiency—Payment by Note.

4. Although the delivery and acceptance of a note does not extinguish the original indebtedness unless the parties agree to give and accept the note as absolute payment, the agreement need not be expressed in terms, but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt.

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*Giving note as loss or damage within contract of indemnity, see notes in 9 **L. R. A. (N. S.)** 478; 20 **L. R. A. (N. S.)** 956; 48 **L. R. A. (N. S.)** 195. REPORTER.

Insurance—Indemnity Insurance—Satisfaction of Judgment—Evidence —Sufficiency.

5. In an action on a policy of indemnity insurance to recover loss sustained and paid in satisfaction of a judgment in favor of an injured employee by the delivery of a note, in which it appeared that the judgment was satisfied of record, evidence *held* to show that the parties agreed that the note should extinguish the judgment.

Insurance—Indemnity Insurance—"Loss Actually Sustained."

6. The giving of a note in satisfaction of a judgment in an employee's action for injuries amounts to a loss actually sustained by the employer within the meaning of a provision of an indemnity insurance policy providing that no action shall be allowed against the insurance company for any loss or expense under the policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, etc.

ON REHEARING.

Stipulations—Construction.

7. Where, in an action on an indemnity policy, a stipulation is filed on day of final judgment, though entered into prior thereto, but subsequent to accrual of liability of defendant to plaintiff, that certain sum in which plaintiff is indebted to defendant, with interest thereon, is a proper legal setoff, which does not fix date to which interest is to be calculated and leaves blank space for insertion of amount, where judgment of lower court allows interest to date of its rendition and plaintiff does not complain of it in that respect until after rendition of judgment in Supreme Court, it must be inferred from language of stipulation, surrounding circumstances, and actions of parties that they intended interest should run until judgment entered in trial court, not merely till liability of defendant to plaintiff accrued.

From Multnomah: HENRY E. McGINN, Judge.

In Banc. Statement by MR. JUSTICE HARRIS.

This is an action on an indemnity insurance policy. The Southwestern Surety Insurance Company issued its policy to E. W. Riner and E. B. Hill, who were partners doing business under the firm name of Riner & Hill and were engaged in constructing a sewer for the City of Portland. By the terms of the policy Riner & Hill were insured against loss and expense arising from claims for damages on account of bodily injuries accidentally suffered by any employee of the insured while engaged in work on the sewer. The insured agreed that if suit should be brought on account of an

accident they would immediately forward all papers served upon them to the insurance company, and the company agreed at its own expense to settle or defend all such suits. The provision of the policy made most prominent by this litigation is known as paragraph L and reads thus:

"No action shall lie against the company for any loss or expense under this policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, within ninety days from the date of said judgment and after trial of the issue."

Abel Markkane, one of the employees of Riner & Hill, was injured while working on the sewer. Markkane commenced an action against Riner & Hill for damages on account of the injury and on February 18, 1914, he obtained a judgment for $2,588.06. The insurance company defended the action in behalf of Riner & Hill. Riner executed a promissory note on May 16, 1914, in the sum of $2,627.42 payable with interest at the rate of 7 per cent per annum on or before one year after date to the order of Abel Markkane. The note was accepted by Abel Markkane and one of his attorneys of record satisfied the judgment. The principal sum named in the note was equal to the principal sum named in the judgment with interest at the rate of 6 per cent per annum, the rate fixed by law. Hill assigned all his interest in the policy to Riner who began this action when the insurance company refused to pay. The parties waived a jury and submitted the cause to the court on the depositions of three witnesses, supplemented by a written stipulation of facts. Acting on the theory that the delivery and acceptance of a note did not constitute loss and payment within the

meaning of the policy, the trial court awarded a judgment to the defendant, and the plaintiff appealed.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

REVERSED. JUDGMENT RENDERED.

For appellant there was a brief over the name of *Mr. John C. Shillock.*

For respondent there was a brief by *Mr. Chester A. Sheppard.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiff takes the position that the execution and delivery of the note was a loss to him, and that the acceptance of the note and formal satisfaction of the judgment amounted to a payment within the meaning of paragraph L of the policy. The defendant contends that the delivery and acceptance of a note is not such a loss and payment as will satisfy the requirements of the contract; and, furthermore, the insurance company insists that, even though it is decided that a judgment can be paid with a note, nevertheless the plaintiff cannot prevail because: (1) The transaction was characterized by bad faith; and (2) the parties did not expressly agree that the note should be accepted in payment of the judgment.

Some notice must be taken of the evidence before we can determine whether the parties acted in good or bad faith or whether the transaction amounted to a payment of the judgment. Hill was hopelessly insolvent and, moreover, he was a nominal rather than a real member of the partnership. Riner may also be regarded as an insolvent, although he had not been

fully paid for all the work done by him, and he probably owned some tools and equipment. Riner could not pay the judgment and Markkane could not enforce its payment. Riner was a contractor and the existence of the judgment hampered him in his efforts to obtain new contracts. It was apparent that it would be to the advantage of both parties if Riner could obtain more contracts for work, because he would then have an opportunity to earn money with which to pay Markkane. A note payable on or before one year after date and the satisfaction of the judgment would not only remove the obstacle that hampered Riner, but it would also extend the time for payment so that for a year, at least, Riner could not be compelled to pay his indebtedness to Markkane, and at the same time Markkane would be benefited by reason of improving the chance of Riner to earn money with which to pay the indebtedness to Markkane; and, moreover, the judgment carried interest at the rate of 6 per cent per annum while the note was to bear interest at 7 per cent. As explained by one of the witnesses "the moving cause" was to give Riner more time "in order to get around" to pay the indebtedness. No witness undertook to suggest that the note was given or received in bad faith; but, on the contrary, every witness, who spoke upon the subject, testified that all parties acted in good faith and that there was no suggestion or understanding that the transaction should be considered any different from what it appeared to be. Riner considered and understood that he paid the judgment with the note. Albert Streiff, one of the attorneys for Markkane, testified that he told Markkane "that at the present time we could not realize anything on the execution" and

"that Riner would pay this here judgment by a note. He didn't like to have that judgment hanging over him, as he could not get credit, and that considering all the circumstances in the case I advised him to take the note, because I told him that he would get seven per cent interest on it and he could sue on it at any time, and the judgment would not be standing against Mr. Riner and it would give him another start, and he would be able to realize on the note more readily than if he had the judgment hanging over him. And with this understanding, why Mr. Markkane agreed that he would accept a note."

1–3. Undoubtedly the attorneys knew that the insurance company would not be liable on the policy until Riner paid the judgment, and they probably considered that the acceptance of the note and satisfaction of the judgment would enable Riner to compel the insurance company to pay the amount of the policy; but this does not amount to bad faith. If the satisfaction of the judgment was real and not a mere pretense, and if there was a real delivery and acceptance of the note, and if the parties either expressly agreed or understood that the note was in truth a payment of the judgment, then the parties acted in good faith; and the additional circumstance that the parties or their attorneys thought or knew that they could then compel the insurance company to pay the policy does not taint the transaction with bad faith. The evidence supports the conclusion that the judgment was in truth satisfied; that the note was in truth given and accepted in payment of the indebtedness; that the parties clearly intended and understood that the note extinguished the judgment; and that they acted in good faith without any agreement or understanding that any step in the transaction should be considered any different from its outward appearance. The defendant is in no position to claim that the failure of Markkane to appear

as a witness for plaintiff argues bad faith. One of the attorneys for Markkane testified that he did not know the whereabouts of Markkane. It is a significant circumstance, too, that the record shows that one of the attorneys for the defendant stated that he knew where Markkane was; and at the conclusion of the taking of the depositions a continuance of the hearing was granted after counsel for defendant stated that they "would like to have it continued until day after tomorrow, and Mr. Markkane will be here." Markkane did not appear nor was his absence explained.

4, 5. Having decided that the parties acted in good faith, the next inquiry is whether there was such an agreement between the parties as the law requires concerning the delivery of a note in payment of a debt. The delivery of the note by Riner and the acceptance of it by Markkane did not extinguish the judgment, unless Riner and Markkane agreed that the note should operate as payment of the judgment. The general rule adopted in most jurisdictions, and followed by this court, is that the delivery and acceptance of a note does not extinguish the original indebtedness, unless the parties agreed to give and accept the note as absolute payment: *Black* v. *Sippy,* 15 Or. 574, 576 (16 Pac. 418); *Kern* v. *A. P. Hotaling Co.,* 27 Or. 205, 215 (40 Pac. 168, 50 Am. St. Rep. 710); *Johnston* v. *Barrills,* 27 Or. 251, 256 (41 Pac. 656, 50 Am. St. Rep. 717); *Schreyer* v. *Turner Flouring Co.,* 29 Or. 1, 4 (43 Pac. 719); *Savage* v. *Savage,* 36 Or. 268, 272 (59 Pac. 461); *Kiernan* v. *Kratz,* 42 Or. 474, 485 (69 Pac. 1027, 70 Pac. 506); *Stringham* v. *Mutual Ins. Co.,* 44 Or. 447, 459 (75 Pac. 822); *Matlock* v. *Scheuerman,* 51 Or. 49, 58 (93 Pac. 823, 17 L. R. A. (N. S.) 747); *Cranston* v. *West Coast Life Ins. Co.,* 63 Or. 427, 438 (128 Pac. 427); *Jonas* v. *Hughes,* 64 Or. 24, 26 (128 Pac. 998);

Seaman v. *Muir,* 72 Or. 583, 589 (144 Pac. 121); *Clarke-Woodward Drug Co.* v. *Hot Lake Sanitorium Co.,* 75 Or. 234, 238 (146 Pac. 135); *Johnson* v. *Paulson,* 83 Or. 238 (163 Pac. 430, 437); 30 Cyc. 1194.

While the books, including at least two of our own precedents, frequently speak of the rule as requiring the parties to "expressly" agree, nevertheless as stated in 30 Cyc. 1201, whenever the question has been specifically considered the decision has been that the parties "agreed," if it is shown that they agreed in terms or that they understood that the acceptance of a note extinguished an antecedent debt. The agreement need not be expressed in terms; but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt: *A. Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.,* 97 C. C. A. 465 (173 Fed. 855, 35 L. R. A. (N. S.) 1); *Wilhelm* v. *Schmidt,* 84 Ill. 183; *Dille* v. *White,* 132 Iowa, 327 (109 N. W. 909); *Haines* v. *Pearce,* 41 Md. 221; *Hotchin* v. *Secor,* 8 Mich. 494; *Riverside Iron Works* v. *Hall,* 64 Mich. 165 (31 N. W. 152); *Randlet* v. *Herren,* 20 N. H. 102; *First Nat. Bk. of Athens* v. *Green,* 40 Ohio St. 431; *Macomber* v. *Macomber* (R. I.), 31 Atl. 753; *Ralston* v. *Aultman-Miller & Co.* (Tex. Civ. App.), 26 S. W. 746; *Sayer* v. *Wagstaff,* 14 L. J. Ch. 116; 9 Ency. of Ev. 755. The evidence shows that Riner clearly understoood that the note extinguished the judgment; and the testimony of Streiff makes it plain that Markkane accepted the note as absolute payment. An additional circumstance which speaks strongly for the contention of the plaintiff is the fact that the judgment was satisfied of record; and, when this circumstance is added to all the other evidence, the plaintiff has shown by clear and

satisfactory evidence that, within the meaning of the general rule, the parties agreed that the note extinguished the judgment.

The remaining question for solution is whether the payment of the judgment by the note of Riner is a loss actually sustained and a payment of the judgment within the meaning of paragraph L of the policy. As a preliminary to the discussion we may note in passing that the plaintiff cites *Sanders* v. *Frankfort Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485 (57 Atl. 655, 101 Am. St. Rep. 688), and, on the authority of that case, it is suggested that by defending the action prosecuted by Markkane, the insurance company converted the policy into a contract against liability as distinguished from a contract to insure against loss. The doctrine announced in *Sanders* v. *Frankfort etc. Co.* was repudiated by this court in *Scheuerman* v. *Mathison*, 74 Or. 40, 57 (144 Pac. 1177). Under the provisions of paragraph L the insurance company is not liable to the assured in any sum unless the latter first pays all or some portion of a final judgment.

6. The contract does not require that the judgment shall be paid in cash, although a loss or expense must actually be sustained and paid in satisfaction of a final judgment; and, hence, as said in *Travelers' Ins. Co.* v. *Moses*, 63 N. J. Eq. 260 (49 Atl. 720, 92 Am. St. Rep. 663), "payment in property is sufficient compliance with its terms." The defendant contends, however, that the judgment must be paid in cash before it can be said that a loss or expense has actually been sustained. The argument made by the insurance company is completely answered in *Kennedy* v. *Fidelity & Casualty Co.*, 100 Minn. 1 (110 N. W. 97, 117 Am. St. Rep. 658, 10 Ann. Cas. 673, 9 L. R. A. (N. S.) 478), where the court says:

"But the whole argument of appellant rests upon the claim that the mere giving of notes did not amount to a loss actually sustained, for the reason that the maker of the notes and the guarantor might never be called upon to make payment, might become insolvent, that there is no certainty they will ever be paid, and, if not paid, there is no loss actually sustained. This means that the party assured, no matter what his financial condition might be, would be compelled to raise the actual cash within sixty days and pay it to the judgment creditor, or be foreclosed from enforcing the indemnity against the company. If the position is sound, the money could not be raised by borrowing at a bank, or at any other place, upon promissory notes secured either by a signer or by property, because, before the notes became due, the property might become worthless, deteriorate in value, or the parties might become insolvent, and no actual payment ever be made; hence no loss. Fairly construed, the language means simply that the judgment must be paid and satisfied within sixty days from date of its entry, and, when such judgment is paid or satisfied, the loss is actually sustained. Of what consequence is it to the company whether respondent has on hand immediate cash to pay the judgment, or whether the judgment debtor is compelled to borrow that amount on the most favorable terms, or whether he makes the payment and secures the satisfaction by the execution of promissory notes running direct to the judgment creditor? Logically there is no difference in the method, and in either case it amounts to a payment and satisfaction of the judgment."

The editors of American and English Annotated Cases say in a note to *Kennedy* v. *Fidelity & Casualty Company,* 10 Ann. Cas. 674, that the rule announced in that case is in accord with the weight of authority, while in a note to the same case the editors of Lawyers' Reports Annotated, 9 L. R. A. (N. S.) 478, say that the rule has the sanction of all the authorities.

An extended research discloses that nearly all, if not all, the courts passing upon the question have ruled that the giving of a note amounts to a loss actually sustained by the person indemnified, within the meaning of a policy like the one held by Riner, where the creditor accepts the note as actual payment and satisfaction of the judgment. Not only the weight of precedent but also the weight of reason gives support to the doctrine that the making and delivery of a note may be a loss actually sustained: *Seattle & S. F. R. & Nav. Co.* v. *Maryland Cas. Co.,* 50 Wash. 44 (96 Pac. 509, 18 L. R. A. (N. S.) 121); *Taxicab Motor Co.* v. *Pacific Coast Casualty Co.,* 73 Wash. 631 (132 Pac. 393). See also *Maryland Casualty Co.* v. *Orchard Land & Timber Co.,* 240 Fed. 364; *Wilson* v. *Smith,* 23 Iowa, 252; *Gardner* v. *Cooper,* 9 Kan. App. 587 (58 Pac. 230, 60 Pac. 540); *Stenbom* v. *Brown-Corliss Engine Co.,* 137 Wis. 564 (119 N. W. 308, 20 L. R. A. (N. S.) 956); *Herbo Phosa Co.* v. *Philadelphia Casualty Co.,* 34 R. I. 556 (84 Atl. 1097, 42 L. R. A. (N. S.) 1109); *West Riverside Coal Co.* v. *Maryland Casualty Co.,* 155 Iowa, 161 (135 N. W. 414, 48 L. R. A. (N. S.) 195). The judgment appealed from is reversed and the plaintiff is awarded a judgment for $2,627.43 less the offset mentioned in the written stipulation filed by the parties.

REVERSED. JUDGMENT RENDERED.

Allowed July 31, 1917.

ON MOTION TO RECALL MANDATE. MOTION ALLOWED.

(166 Pac. 952.)

Mr. John C. Shillock, for the motion.

Mr. Chester A. Sheppard, contra.

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

7. The original opinion concludes with the statement that plaintiff "is awarded a judgment for $2,627.43, less the offset mentioned in the written stipulation filed by the parties": *Riner* v. *Southwestern Surety Ins. Co.* (Or.), 165 Pac. 684, 687. When our mandate issued it contained a direction to allow interest on the offset to June 19, 1917, the date when the written opinion was filed. The plaintiff asks to have the mandate recalled so that it may be corrected by allowing interest only until May 16, 1914.

It will be recalled that Markkane obtained a judgment against Riner & Hall for $2,588.06, and on May 16, 1914, Riner paid the judgment by giving his note for $2,627.43.

Riner was indebted to the Southwestern Surety Company in the sum of $1,423.85 and for that reason the parties stipulated, in their agreed statement of facts, thus:

"It is further agreed that if the plaintiff is entitled to recover in this action that said sum of $1423.85, together with interest thereon at the rate of 6 per cent per annum from Feb. 18, 1914, amounting to the sum of $——, is a proper legal offset against the amount due and owing to the plaintiff herein."

Although dated February 18, 1915, the stipulation was not filed until December 30, 1916.

The judgment appealed from was rendered on December 30, 1916, and in part reads as follows:

"It is considered, ordered and adjudged that plaintiff take nothing from this action, that plaintiff's complaint be dismissed, and that defendant recover of and from plaintiff the sum of $1423.85 with interest thereon from Feb. 18, 1914."

Riner now for the first time contends that interest should not be allowed after May 16, 1914, the date when he paid the Markkane judgment. It will be observed that the stipulation contains a blank space for the insertion of the interest when calculated, thus plainly implying that the parties could not then calculate the interest because they did not at that time know when some event, yet to take place and to the date of which interest would be figured, would occur. Looking at the whole paragraph, it is reasonably plain that the event, yet to occur, was the judgment to be rendered in the Circuit Court and that the parties intended that interest should be allowed up until such time as a judgment might be entered in the Circuit Court. Furthermore, if we again look at the judgment entered in the Circuit Court it will be seen that it contemplates that interest is to be calculated to the date of the judgment. The stipulation was both signed and filed after May 16, 1914, and, if the parties had intended that interest should run only until May 16, 1914, or to February 18, 1915, it is fair to assume that they would have calculated the interest and inserted the amount, because they could have readily done so. While it is true that Riner appealed from the whole judgment, it is also true that it was not until

he filed this motion that he asserted that interest could not be allowed after May 16, 1914, and, by failing to complain about the allowance of interest by the Circuit Court, he has himself construed the stipulation to mean that interest shall be allowed at least until the date of the judgment in the Circuit Court. It may be that the parties considered that if Riner recovered a judgment from the company the judgment would include interest on his claim from May 16, 1914, the date when he paid the Markkane judgment, and that, therefore, whenever Riner obtained his judgment it would represent the difference between $2,627.42 plus interest from May 16, 1914, and $1,423.85 plus interest from February 18, 1914. Riner, however, was not entitled to interest: *Sargent* v. *American Bank & Trust Co.*, 80 Or. 16, 42 (154 Pac. 759, 156 Pac. 431).

The language of the stipulation, the surrounding circumstances and the construction which Riner has himself placed upon the stipulation by failing sooner to object to the allowance of interest, all lead to the conclusion that the parties to the stipulation contemplated that interest should be allowed until some date subsequent to May 16, 1914. The parties undertook to contract with reference to the payment of interest and their intent, when properly ascertained, will control: 22 Cyc. 1490. We are of the opinion that the stipulation contemplates that interest is to be calculated on the offset for the period ending December 30, 1916, the date when the judgment was rendered in the Circuit Court. MOTION ALLOWED.

Argued June 7, affirmed July 3, former opinion sustained on petition for rehearing July 31, 1917.

CALIFORNIA TROJAN POWDER CO. *v.* WADHAMS & CO.

(166 Pac. 759, 762.)

Appeal and Error—Trial—Findings of Fact—Weight of Evidence—Review.

1. The weight of the evidence is for the court, and its findings of fact in a law action are conclusive if there is any evidence to support them.

Attachment—Statute—To Whom Applicable.

2. Under Section 7427, L. O. L., providing that whenever any machinist, artisan, laborer, etc., shall have furnished or procured any materials for use in the construction, etc., of any building or other improvement, such materials shall not be subject to an attachment, etc., to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction or repair of such building, structure or improvement; plaintiff, who sold powder to be used in the construction of a logging road, would be entitled to protection against an attachment, the statute not being designed for the benefit of judgment debtors only.

[As to liability to attachment at suit of contractor's creditor of materials furnished to be used in construction of building, see note in Ann. Cas. 1913A, 876.]

Attachment—Notice of Claim.

3. The exemption from attachment for materials furnished under Section 7427, L. O. L., is an absolute one, and plaintiff was not required to make a timely claim thereof before sale in order to avail himself of the exemption.

Attachment—Bad Faith—Burden of Proof.

4. Under Section 7427, L. O. L., exempting from attachment materials furnished for use in the construction of a building, or other improvement, the burden was on the attachment creditor to show bad faith in the purpose for which the materials were on the ground.

Attachment—Wrongful Attachment—Proximate Cause.

5. Where plaintiff, under Section 7427, L. O. L., had the right to a lien for materials furnished, and the exclusive right of attachment, defendant's attachment suit, which deprived plaintiff of both his rights, leaving his debt unpaid, was the proximate cause of the injury from wrongful attachment.

From Multnomah: Henry E. McGinn, Judge.

Action by the California Trojan Powder Company, a corporation, against Wadhams & Company, a cor-

poration, in which plaintiff recovered judgment for the amount prayed for in the complaint and defendant appeals. Affirmed.

Department 1. Statement by Mr. Justice Benson.

This is an action for damages. The complaint alleges that plaintiff sold to Abbott-Forrester Company, a contracting corporation, certain powder for the sum of $147.05, to be used in the construction of a logging railroad for the Booth-Kelly Lumber Company; that the powder was delivered and placed upon the roadbed upon the condition that it was to be used in the construction of the road, in order that plaintiff might have a lien upon the road for the powder so furnished; that while the powder remained upon the roadbed and was in good faith about to be used in the construction of the road, defendant caused it to be attached by the sheriff of Lane County and later sold at execution sale to one E. E. Morrison; and that plaintiff was damaged thereby in the sum of $147.05.

An answer consisting of denials was filed. Thereafter defendant filed a motion for judgment on the pleadings based upon the contention that the complaint did not state facts sufficient to constitute a cause of action, which was denied. Thereupon defendant filed an amended answer setting up the execution and delivery to it of a promissory note by Abbott-Forrester Company; that demand for payment was made and refused; that the contractor has defaulted in its contract with the Booth-Kelly Lumber Company for the construction of the logging road; that having entirely ceased operations thereon, defendant caused a writ of attachment to issue and, relying upon the apparent ownership of the property in Abbott-Forrester Company and the failure of

plaintiff to make any claim thereto, the sheriff seized certain personal property, including the powder mentioned in the complaint, although Abbott-Forrester Company and plaintiff knew of such attachment at the time of the levy and defendant was ignorant of any right or claim of plaintiff therein; that thereafter defendant recovered judgment and, on January 29, 1914, after due advertisement and notice in accordance with law, a sheriff's sale was had of a part of the attached property, including the powder, and the proceeds credited upon defendant's judgment; and that by its silence and acquiescence in these acts, plaintiff has waived any right it might have had to an exemption of such powder from execution and ought to be estopped from showing that it was injured thereby.

A reply was filed consisting of a general denial. A trial was had wherein, after plaintiff had rested, defendant moved for a nonsuit upon the grounds that the evidence fails to show that the attachment was the proximate cause of plaintiff's damages; that the evidence fails to show that plaintiff ever gave notice to anyone that the property was exempt from attachment; and that the complaint, under Section 7427, L. O. L., does not state facts sufficient to constitute a cause of action. A judgment having been rendered in favor of plaintiff, defendant appeals.

Affirmed.

For appellant there was a brief over the names of *Mr. Thaddeus W. Veness* and *Messrs. Teal, Minor & Winfree,* with an oral argument by *Mr. Veness.*

For respondent there was a brief and an oral argument by *Mr. C. L. Whealdon.*

Mr. Justice Benson delivered the opinion of the court.

There are more than thirty assignments of error but counsel for defendant in their brief begin their argument with this statement of their contention:

"Appellant depends for reversal upon two main propositions: One of law, the other of fact.

"A. The right of exemption of building materials from attachment depends upon a timely claim therefor.

"B. Regardless of any claim of exemption, the building materials in question were not within the statute, for under the facts, they were not in good faith about to be used. All the points of law and argument herein contained are incidental to these two main propositions."

We shall therefore consider these two points, first taking up the one labeled B. Upon this feature it is sufficient to say that in the bill of exceptions we find the following stipulation:

"That A. C. Forrester, if called as a witness on behalf of the plaintiff, would testify that he was manager on the work in question and that at the time of this attachment the powder was on the ground about to be used in the construction of the road."

The case was tried without intervention of a jury, and the court made a finding of fact in which he uses this language:

"That while said powder remained upon said roadbed and was in good faith about to be used in the construction of said logging road, defendant Wadhams & Company did cause said powder to be attached by the sheriff of Lane County, Oregon, and later sold at execution sale to one E. E. Morrison."

1. It is true that other evidence was introduced tending to contradict the stipulated evidence, *supra,* but

the weight of it was for the court, and it has been repeatedly held that the findings of fact made by the trial court in a law action are conclusive, if there is any evidence to support them: *Smith* v. *Badura,* 70 Or. 58 (139 Pac. 107). In this connection our attention has been called to the interesting case of *Potvin* v. *Wickersham,* 15 Wash. 646 (47 Pac. 25), which was in some respects similar to the case at bar. The Denny Hotel Company was erecting a building in Seattle. Potvin was the contractor. Work on the building had been suspended for a considerable length of time in consequence of litigation. Wickersham, the architect, had reduced his claim to judgment and levied upon certain materials on the ground, and suit was brought to restrain the execution sale. The Washington statute is practically identical with our own. In the opinion in this case, we find the following:

"The statute (Section 1675) exempts materials from seizure under attachments or execution so long as they are in good faith designed to be used in the construction of the building, unless it be upon a claim for the purchase money; and one ground for contention in this case was that the materials were intended to be used in the completion of the building, and whether this was to be done by the hotel company or by the one succeeding to its rights upon the determination of the litigation pending is immaterial; nor would the fact that this litigation had been pending for a number of years affect this question, or necessarily require a finding that there was no intention to use the materials in the completion of the building."

2. We turn then to the discussion of point A. The statute upon which this action is founded reads thus:

"Whenever any mechanic, artisan, machinist, builder, lumber merchant, contractor, laborer, or other person shall have furnished or procured any materials

for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, structure, or other improvement'': Section 7427, L. O. L.

It is urged by defendant that under this statute plaintiff is not in a position to claim any protection, because he is not the judgment debtor and, in support of its contention, a number of cases are cited which are all based upon the general exemption statute, being Section 227, L. O. L., the introduction of which is in the following language:

"All property, including franchises, or rights or interest therein, of the judgment debtor, shall be liable to an execution, except as in this section provided. The following property shall be exempt from execution, if selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon thereafter before sale thereof as the same shall be known to him, and not otherwise."

It will be observed that Section 7427, L. O. L. being a section in the chapter on mechanics' liens, contains no such language and cases containing an interpretation of Section 227 are of no practical value in throwing light upon the questions involved here. Our attention has not been called to any case construing the act in question, and it seems that the problem has never before been submitted to this court for solution; but, from the language used, it seems clear to us that the law is designed not only for the benefit of a judgment debtor, but equally for the protection of the materialman "who shall have *furnished* materials, etc." Under this act, he may file a lien for his debt

or he may attach the specific property furnished by him in order to secure payment for his claim, but no other creditor has any right to the remedies of attachment, execution or other legal process upon such materials. Therefore, we conclude that the law gives the plaintiff a right of action in the premises and does not confine its beneficence to a judgment debtor.

3, 4. We cannot agree with defendant's further contention that in order to avail itself of the exemption the plaintiff must make a timely claim therefor before sale. The exemption is an absolute one which the attaching litigant and the sheriff are presumed to know. The burden is upon them to show any bad faith in the purpose for which the materials are on the ground. We are not called upon to decide whether or not the plaintiff might waive his right to exemption for, while the evidence is conflicting, there is evidence in the record supporting plaintiff's allegation that he was ignorant of the levy until long after sale, and the trial court has made a finding to that effect.

5. As regards the question of the effect of defendant's acts as the proximate cause of plaintiff's injury, it is enough to say that plaintiff has a right to a lien upon the improvement when its materials should be finally used in the construction thereof, and the statute gives it the exclusive right to attach such materials for its debt. Both of these rights have been rendered nugatory by the acts of the defendant, and plaintiff's debt is still unpaid. The judgment is affirmed.

Affirmed.

Mr. Chief Justice McBride, Mr. Justice Burnett and Mr. Justice Moore concur.

Former opinion sustained July 31, 1917.

On Petition for Rehearing.

(166 Pac. 762.)

Messrs. Teal, Minor & Winfree, and *Mr. Thaddeus W. Veness,* for the petition.

Mr. C. L. Whealdon, contra.

Department 1. Opinion by Mr. Chief Justice McBride.

In an able and plausible brief defendant again insists that plaintiff has no standing in court because of its failure to make timely claim to the property attached. While the right of attachment has a common-law origin dating from certain customs of the City of London, its efficacy in our jurisprudence is clearly a creature of the statute, and in pursuing the remedy the statute is our only guide. It is conceded that the statutes of this state do not in terms require the seller of supplies intended to be used in the construction of a railroad to claim the exemption of such property before levy, or after levy and before sale, but it is urged that upon common-law principles such must be his action in order to protect the right which the law gives him as a materialman to subject the road upon which the material is to be used to a lien or to have its proceeds applied in payment of the purchase price. These contentions go wholly to the policy of the law. The position of the materialman is entirely different from that of the debtor who claims an exemption. The rights and relations of a materialman to the property seized are more nearly analogous to those of one whose property

has been attached in an action against a third party. He has a right in the property and its proceeds which is entirely distinct from and independent of the right of the judgment debtor. It has never been the law that a third person not a party to the attachment action, but having an interest in the property, should be required to make a claim after seizure and before sale.

"The third person whose property is wrongfully attached as that of the defendant has his action for damage against the officer, or the plaintiff, or both, as the nature of the wrong done may indicate, whether he has intervened in the attachment suit to protect his property or not; whether he has demanded of the officer a release of his property or not": Waples on Attachment, § 304.

If the plaintiff being cognizant of the levy had stood by and permitted the sale without objection, it is possible that its failure to make known its rights would have operated to raise an estoppel that would bar a recovery, but as shown in the opinion of Mr. Justice Benson that is not this case. That the statute is somewhat crude must be admitted, and that in many instances it may work a hardship upon the plaintiff and upon the officer executing the writ may also be conceded; but those are matters to be remedied by legislation, and the courts are not justified in adding to the statute by construction terms not found there in order to ameliorate such supposed hardships. It might well be urged, on the other hand, that creditors residing at a distance or outside of the state, and who had sold property in reliance upon the fact that it would be held by the law subject to answer for the purchase price, should not lose that preference by reason of not being upon the ground to object to the levy of an attachment

by some other creditor whose claim could certainly possess no greater equity and possibly less.

We adhere to our original opinion.

FORMER OPINION SUSTAINED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE MOORE concur.

MR. JUSTICE HARRIS taking no part in the consideration of this case.

Argued July 11, affirmed July 31, 1917.

HOLLISTER *v.* HOLLISTER.*

(166 Pac. 940.)

Powers—What Law Governs—Execution.

1. Where the donor of a power lived in New York, and trust property and trustee were located there, the law of such state governs in determining whether the power was validly executed, although donee lived, and attempted to exercise such power, in Oregon.

Wills—Validity—What Law Governs.

2. Ordinarily a will's validity is determined by the law of the testatrix's domicile.

[As to validity in another jurisdiction of election made with respect to will, see note in **Ann. Cas.** 1914A, 446.]

Powers—Execution.

3. At common law, the donee of a power must clearly manifest an intention to execute it, and where it is clear that the donee intended to execute it, and the transaction is susceptible of no other interpretation, then it is deemed executed.

Statutes—Foreign Statutes—Necessity of Pleading.

4. Where appellee's brief recites and relies upon New York statutes and decisions, and appellant admits they are correctly stated, the Supreme Court will consider them, where the rights of strangers are not involved, although such statutes and decisions were not pleaded.

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*On the question as to what is a sufficient execution by will of a power of appointment, see comprehensive note in 64 **L. R. A.** 849.

REPORTER.

Wills—Powers—Execution.

5. Under the New York law, a residuary clause in a will executes a power to dispose of personalty by will, especially as Laws N. Y. 1897, Chapter 417, Section 6, makes personalty embraced in a power to bequeath pass by a will purporting to pass all the personalty, unless a contrary intent is manifest.

From Coos: JOHN S. COKE, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

William Henry Hollister died in January, 1912, in the State of New York, where he was domiciled, leaving a will which was admitted to probate on February 1, 1912, in the Surrogate's Court of the County and State of New York. The testator bequeathed the sum of $40,000 to the Central Trust Company of New York City, in trust, to invest and to pay the net income to Philoclea A. Hollister, of North Bend, Oregon, during her lifetime and, upon her death, to pay the principal of the trust fund to such person or persons as Philoclea A. Hollister might direct by her last will and testament; and, in case she failed to make a will, the trustee was directed to pay the trust fund to the children of Philoclea A. Hollister.

Philoclea A. Hollister died in the City of North Bend, Oregon, where she was domiciled, on the 7th day of October, 1912, leaving a will dated July 15, 1912, by which she bequeathed $32,000 to her daughter Frances S. Furry; $2,000 to her son George Stanton Hollister; $1,000 to her grandson Frederick Bergman Hollister; $1,000 to her daughter-in-law Mary Hollister; $1,000 to her daughter-in-law Carrol M. Hollister; and $1,000 to her son-in-law Dave L. Furry. The remainder is disposed of by a residuary clause which reads thus:

"I give and devise and bequeath all of the rest, residue, and remainder of my estate of every name and

nature whatsoever, owned by me at the time of my death to my beloved son Frederick Hollister."

At the time of her death, Philoclea A. Hollister did not own any property except about $2,000 in cash and other personal property worth approximately $1,000. Philoclea A. Hollister was survived by her three children George Stanton Hollister, Frederick Hollister and Frances S. Furry.

On June 23, 1913, the Central Trust Company paid to Frederick Hollister the sum of $39,014.57 as the principal of the trust fund, less certain charges, on the theory that the will of Philoclea A. Hollister designated him as the person to whom the trust fund should be paid.

The complaint alleges that Philoclea A. Hollister failed to name any person in her will to whom the trust fund should be paid and that because of such failure the trust fund must be divided equally between the plaintiff George Stanton Hollister, the defendant Frederick Hollister and their sister Frances S. Furry. There was a decree for the defendant and the plaintiff appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. A. S. Hammond.*

For respondent there was a brief and an oral argument by *Mr. Frederick Hollister, propria persona.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The only question for decision is whether the residuary clause in the will of Philoclea A. Hollister operates as an execution of the power which the will of William Henry Hollister conferred upon Philoclea A.

Hollister. The plaintiff takes the position that the power has not been executed, and that therefore the trust fund must be paid to the children of Philoclea A. Hollister. The defendant contends that the residuary clause in the will of Philoclea A. Hollister operated as a complete execution of the power, and that therefore he is entitled to retain the trust fund which was paid to him by the Central Trust Company. If the residuary clause in the will of Philoclea A. Hollister executed the power to name the person to whom the trust fund should be paid, then the defendant is entitled to prevail; but, if the power was not executed, the fund must be divided among the children as directed by the will of William Henry Hollister.

1, 2. As a preliminary to the decision of the ultimate question, we must first ascertain whether the law of New York or the law of Oregon shall govern. By the terms of the will of William Henry Hollister, only the net income of the principal fund was to be paid to Philoclea A. Hollister. She never owned the trust fund. She only had the power to name the person or persons to whom the principal of the trust fund should be paid upon her death; and a person named by her as the beneficiary of the trust fund takes under the will of William Henry Hollister and not through Philoclea A. Hollister nor even under her will. The beneficiary takes the trust fund as property owned by William Henry Hollister and not as property owned by Philoclea A. Hollister. The donor of the power merely uses the donee of the power as an instrumentality for the selection of a beneficiary; and, when selected, the beneficiary takes directly from the donor of the power and not from nor through the donee of the power.

The testator, William Henry Hollister, was domiciled in New York; the trust fund was at all times actually within the State of New York; and the trustee was a New York trustee. Since the trust fund was personalty which was not only actually in New York but was also owned by a person domiciled in New York, and the trustee was likewise in New York, it necessarily follows that the trust fund was at all times subject to the laws of New York. The State of Oregon cannot control the disposition of personalty which is not only owned in New York but is actually in New York; and hence the question of whether the power conferred by William Henry Hollister has been executed, is to be governed by the laws of New York and not by the laws of Oregon, although the general rule is that the validity of the will of Philoclea A. Hollister, considered as a will, is to be determined by the laws of Oregon. No attack is made upon the will of Philoclea A. Hollister; and it may therefore be assumed that it is a valid will. It will not be necessary to inquire whether, under the laws of Oregon, a residuary clause in the will of the donee of a power would operate as an execution of such power, for the reason that the laws of New York must govern in the decision of the instant case: *Cotting* v. *De Sartiges,* 17 R. I. 668, 669 (24 Atl. 530, 16 L. R. A. 367); *Sewall* v. *Wilmer,* 132 Mass. 131; *Lawrence's Estate (Appeal of Appleton),* 136 Pa. St. 354 (20 Atl. 521, 20 Am. St. Rep. 925, 11 L. R. A. 85); *Bingham's Appeal,* 64 Pa. St. 345; *Lane* v. *Lane's Admx.,* 4 Penne. (20 Del.) 368 (55 Atl. 184, 103 Am. St. Rep. 122, 64 L. R. A. 849); *Rhode Island Hospital Trust Co.* v. *Dunnell,* 34 R. I. 394 (83 Atl. 858, Ann. Cas. 1914D, 580); 31 Cyc. 1133.

3. Under the rule of the common law the donee of a power must manifest an intention to execute the power.

A power fails of execution if it be doubtful whether the donee intended to execute the power. If, however, it is apparent and clear that the donee intended to execute the power and the transaction is not fairly susceptible of any other interpretation, then the power is deemed to be executed. The intention to execute the power must appear in its execution, either expressly or by necessary implication, 31 Cyc. 1121; and, while other cases may exist, the books usually speak of three classes of cases as a sufficient demonstration of an intention to execute a power: (1) When the instrument which executes the power makes some reference to the power; (2) when the instrument which executes the power refers to the property which is the subject of the power, or the instrument creating the power, or the authority for exercising the power; and (3) where the instrument executed by the donee of the power would have no operation except as an execution of the power: *Blagge* v. *Miles,* 1 Story, 426 (Fed. Cas. No. 1479); *Lane* v. *Lane's Admx.,* 4 Penne. (20 Del.) 368 (55 Atl. 184, 103 Am. St. Rep. 122, 64 L. R. A. 849).

In the absence of statutes, the rules of the common law relating to the execution of powers are followed in most of the jurisdictions in this country, although as early as 1863, the courts of Massachusetts rejected the common-law doctrine and adopted a rule analogous to the statutory rule found in 1 Vict., C. 26, Section 27, which was enacted in England in 1837, and provides that a general devise of real property of the testator should be construed to include all real estate over which such testator may have had a power of appointment, and should operate as the execution of such power, unless a contrary intention should appear by the will, and that a general bequest of the personal property of the testator should be construed to include all the per-

sonal property over which the testator may have had a power of appointment, and should operate as the execution of such power, unless a contrary intention appeared in the will: *Amory* v. *Meredith,* 7 Allen (89 Mass.), 397. Some of the states have enacted statutes changing the common-law rules relating to the execution of powers; and New York is one of the states which have changed the common-law rules.

4. Neither party pleads the New York decisions, nor does either party plead the enactment or existence of any statute of New York; but in his printed brief, Frederick Hollister gives a statement of the original New York statute and the subsequent judicial decisions. He relies upon the statute and decisions of the State of New York. George Stanton Hollister expressly admits in his brief that the facts are "correctly stated" in the brief of the defendant "and that the law is as there set forth"; and the sole contention made by the plaintiff is that "it does appear from the will of Philoclea A. Hollister that she did not intend to execute the power." The plaintiff expressly admits the right of the defendant to look to the New York statutes and decisions and no question is raised because of a failure to plead the New York statutes. The cause was tried and determined upon facts which are recited and admitted in the pleadings; and, since this adjudication will not bind strangers to the litigation, we shall assume, under the circumstances existing here, that a failure to plead the New York statute does not prevent us from ascertaining and applying the law of New York.

5. In the early history of the state, and even before the passage of the English statute, New York passed a statute which is found in 1 Revised Statutes of New

York, page 737, Section 126, as printed and published in 1829, and reads thus:

"Lands embraced in a power to devise, shall pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall not operate as an execution of the power, shall appear, expressly or by necessary implication."

Although the statute was in terms only applicable to real estate the courts of New York reasoned by analogy and adopted a like rule to be applied to general bequests of personal property. The doctrine adopted by the courts with reference to personalty was approved by the legislature of New York in 1897, when it enacted a statute which reads thus:

"Personal property embraced in a power to bequeath, passes by a will purporting to pass all the personal property of the testator; unless the intent, that the will shall not operate as an execution of the power, appears therein either expressly or by necessary implication": Vol. 1, Ch. 417, Section 6, Laws of 1897 of New York.

Whether viewed with reference to the judicial rule which prevailed in New York even before the existence of a statute including personalty, or with reference to the statutory rule of 1897, the residuary clause in the will of Philoclea A. Hollister operated as an execution of the power conferred upon her, unless it can be said that an intent not to execute the power appears in her will "either expressly or by necessary implication." The will does not in terms express an intent not to execute the power; nor, on the authority of *Lockwood* v. *Mildeberger,* 159 N. Y. 181, 186 (53 N. E. 803), is such an intent necessarily implied, for it is there stated that:

"Necessary implication results only where the will permits of no other interpretation. Necessary is de-

fined to mean: 'Such as must be'; 'Impossible to be otherwise'; 'Not to be avoided'; 'Inevitable.' The intent not to execute the power, therefore, must not be implied unless it so clearly appears that it is not to be avoided."

Applying the law of New York, as enacted by the legislature and as construed by the courts of that state, to the residuary clause appearing in the will of Philoclea A. Hollister, the inevitable conclusion is that the residuary clause executed the power; and, therefore, Frederick Hollister was entitled to receive the principal of the trust fund from the trustee: *Hirsch* v. *Bucki*, 162 App. Div. 659 (148 N. Y. Supp. 214); *Mott* v. *Ackerman*, 92 N. Y. 539; *New York Life Ins. & T. Co.* v. *Livingston*, 133 N. Y. 125 (30 N. E. 724); *Cutting* v. *Cutting*, 86 N. Y. 522; *In re Mayo's Will*, 76 Misc. Rep. 416 (136 N. Y. Supp. 1066); *Hutton* v. *Benkard*, 92 N. Y. 295; *McLean* v. *McLean*, 174 App. Div. 152 (160 N. Y. Supp. 949). The decree of the Circuit Court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Submitted on briefs July 17, affirmed July 31, 1917.

HALSEY *v.* SIMMONS.*

(166 Pac. 944.)

Landlord and Tenant—Crop Lease—Rights of Parties.

1. Where the land owner leases the land on a crop share rental, he and the lessee are tenants in common after the crop is harvested, and such relationship is not necessarily inconsistent with the relation of landlord and tenant.

[As to relation between owner of premises and person working land for share of crops, see note in **Ann. Cas.** 1914B, 148.]

*On replevin for undivided interest in personal property, see note in **37 L. R. A. (N. S.) 267.** REPORTER.

Replevin—Right to Writ.

2. Though, as a general rule, replevin cannot be maintained to recover an undivided interest in a specified article of personalty, it will lie to recover an undivided interest in a specified article of personalty if the property sought to be recovered is part of a larger mass of the same nature and quality.

Tenancy in Common—Right to Replevy Property.

3. As a general rule, one tenant in common of personalty cannot ordinarily maintain replevin against a co-owner, since he must have the right of exclusive possession, but where one co-owner of personalty susceptible of division repudiates the interest of the other and takes possession of the property and converts it to his own use, the other may maintain replevin.

In Banc. Statement by MR. JUSTICE HARRIS.

J. D. Halsey brought this action to replevy an undivided one third of a crop of wheat grown and threshed on land which Halsey had verbally leased to J. D. Simmons for the year 1916.

Simmons threshed and sacked the wheat, but by reason of the threshing-machine having been moved from place to place the sacks were placed in three piles on the land. Halsey claimed that Simmons agreed to deliver "at the machine," as rent, one third of all wheat grown and threshed on the land during 1916. Simmons denied that he had agreed to deliver a share of the crop in payment of rent and contended that he had agreed to pay $200 cash rent; and he tendered this amount to Halsey who refused to accept it. Halsey then brought this action to recover his alleged share of the wheat grown and threshed on the land. A writ of replevin was placed in the hands of the sheriff who executed it by taking possession of the three piles of grain, one pile containing 227 sacks, one 228 sacks and another 400 sacks, aggregating 855 sacks. A trial by jury resulted in a verdict awarding to plaintiff 617½ bushels of wheat or its value $708.37, if delivery of the wheat could not be had, and the defendants J. D. Sim-

mons and Ed Simmons appealed from the consequent judgment.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi).

AFFIRMED.

For appellant there was a brief over the names of *Mr. J. A. Burleigh* and *Mr. A. W. Schaupp.*

For respondent there was a brief over the names of *Mr. A. B. Conaway* and *Mr. A. Fairchild.*

MR. JUSTICE HARRIS delivered the opinion of the court.

We must assume from the verdict that the jury found from the conflicting evidence that Simmons had agreed to deliver one third of the grain as rent. The assignments of error are numerous and arise out of the refusal of the court to direct a verdict for the defendants, the refusal to give certain requested instructions and the giving of other instructions. The principal assignments of error may be grouped into two classes since the defendants contend that they were entitled to a judgment (1) Because the lease created the relation of landlord and tenant and therefore the title to the wheat and right of possession was in the tenant until an actual segregation of the wheat; and (2) an undivided interest in property cannot be replevied.

1. J. D. Simmons argues that the lease created the relation of landlord and tenant; that as tenant he had title to the wheat in its entirety and had the right to the exclusive possession of all the grain until he himself segregated and set apart any portion that might be due Halsey; and that since the grain had not been segregated, Halsey could not maintain replevin because this

form of action cannot be maintained unless the plaintiff has a right of possession. Halsey contends that as to the crop he was a tenant in common and hence had an interest in the grain with an accompanying right of possession. There is a hopeless and irreconcilable conflict among the authorities in other jurisdictions relative to situations like the one here: 8 R. C. L. 373; 16 R. C. L. 583. It will not be necessary, however, to attempt an analysis of the variant holdings in other jurisdictions, for the question is settled in this state. It is the law in Oregon that on the facts involved here the lessor and lessee are tenants in common in the crop when the rental is a share in the crop: *Cooper* v. *McGrew,* 8 Or. 327, 328, 331; *Messinger* v. *Union Warehouse Co.,* 39 Or. 546, 549 (65 Pac. 808); *Abernethy* v. *Uhlman,* 52 Or. 359, 364, 368 (93 Pac. 936, 97 Pac. 540). Halsey, therefore, had an interest as tenant in common in the crop; and it may be added that the relationship as tenants in common as to the wheat was not necessarily inconsistent with the relation of landlord and tenant as to the land: 24 Cyc. 1471; 16 R. C. L. 61.

2. It is next argued that replevin will not lie to recover an undivided interest in personal property. The general rule, accepted here as elsewhere, is that replevin cannot be maintained to recover an undivided interest in a specified article of personal property: *Guille* v. *Fook,* 13 Or. 577, 586 (11 Pac. 277); *Phipps* v. *Taylor,* 15 Or. 484, 488 (16 Pac. 171); *Huffman* v. *Knight,* 36 Or. 581, 584 (60 Pac. 207); *Sharp* v. *Johnson,* 38 Or. 246, 249 (63 Pac. 485, 84 Am. St. Rep. 788); *Schwarz* v. *Lee Gon,* 46 Or. 219, 222 (80 Pac. 110). An exception, which is frequently recognized, may exist when the property sought to be recovered is a part of a larger mass of the same nature and quality, as for example cereals, which can be easily divided into aliquot

parts: 34 Cyc. 1359; Cobbey on Replevin (2 ed.), § 400; *McDonald* v. *Bailey,* 25 Okl. 849 (107 Pac. 523, 37 L. R. A. (N. S.) 267); *Sutherland* v. *Carter,* 52 Mich. 151, 471 (17 N. W. 780, 18 N. W. 223).

3. Another general rule is that the claimant of personalty must have the right of exclusive possession and all co-owners must unite for the reason that neither has the right of exclusive possession; and, hence, one tenant in common cannot ordinarily maintain replevin against a co-owner: 34 Cyc. 1393; but to this general rule an exception also arises where one part owner of property which is susceptible of division repudiates the interest of another part owner, takes possession of the common property and converts it to his own use: 34 Cyc. 1394; Cobbey on Replevin (2 ed.), § 238; *Fines* v. *Bolin,* 36 Neb. 621 (54 N. W. 990); *Cornett* v. *Hall,* 103 Mo. App. 353 (77 S. W. 122); *Schwartz* v. *Skinner,* 47 Cal. 3.

The instant case is within the respective exceptions to the two general rules mentioned. Although one of the printed briefs makes some reference to frosted wheat, the transcript of the testimony does not disclose any evidence concerning the grade or quality of the wheat, except the testimony of T. H. Moorelock, a grain buyer, who said that the grain was "No. 1 forty-fold wheat." Simmons denied that Halsey had any interest in the wheat, and hence the latter as a tenant in common was entitled to maintain an action in replevin. All the persons who claim an interest in the wheat are parties to this action and therefore the instant litigation is to be differentiated from those cases where only one of two or more co-owners is alone attempting to recover from some third person.

Simmons also contends that on the authority of *Schwarz* v. *Lee Gon*, 46 Or. 219 (80 Pac. 110), the action must fail. That case is easily distinguished from this. There the plaintiff sought to recover 86 bales of hops. The bales varied in weight from 185 to 205 pounds and as said by the court: "The purchase was made severable as to bales, thus plainly implying that the hops might not be of the same grade or quality." There the indications were that the hops were not of the same grade or quality; here the wheat is of the same grade or quality; there the action was to recover a certain number of bales; here the action is to recover one third of the whole amount. The complaint says that Halsey is entitled to 1,000 bushels of wheat and the reply supplements the complaint with the explanation that the wheat demanded by the complaint is the rental claimed by Halsey. Whether the one third is determined by weight or by dry measure the share belonging to Halsey could have been easily ascertained, and the fact that the grain was in sacks did not make it more difficult to divide. If the sacks do not weigh the same, that circumstance would only prevent the parties from using the number of sacks as the sole basis of division.

Simmons insists that there was no evidence from which the jury could determine the amount of the wheat belonging to Halsey. The testimony of Moorelock to the effect that No. 1 forty-fold wheat "generally runs from two bushels to two and a quarter to the bag or one hundred and thirty to one hundred and thirty-five pounds" when supplemented by "testimony as to the number of bags of wheat and as to the weight of the bags, depending upon how the bags were filled and the condition of the wheat" was enough to justify the finding rendered in the verdict.

The substance of the requested instructions relating to the burden of proof was given in the general charge.

The rulings of the trial court conformed to the views expressed here; and the judgment is therefore affirmed.

AFFIRMED.

Motion to dismiss appeal denied September 21, 1915.
Appeal dismissed on stipulation September 4, 1917.

FREEMAN *v.* SOUTHERN PAC. CO.

(151 Pac. 654.)

Appeal and Error—Record—Transcript—Time of Filing—"Proceedings."

1. Where on appeal an order was made extending the time in which to file "a transcript of the testimony and proceeding" until July 10th, the word "proceedings" was broad enough to cover the entire transcript, and a filing on April 8th was sufficient.

From Multnomah: ROBERT G. MORROW, Judge.

On motion of respondent to dismiss appeal. Motion denied.

Mr. Arthur I. Moulton, for the motion.

Mr. William D. Fenton, Mr. Ralph E. Moody, Mr. John F. Reilly and *Mr. Paul P. Farrens, contra.*

In Banc. MR. JUSTICE EAKIN delivered the opinion of the court.

This is a motion to dismiss the appeal. The plaintiff obtained a judgment against the defendant on the seventh day of March, 1915. On the 4th of May a notice of appeal was served and filed. May 12th an undertaking was served and filed.

On the tenth day of June the court below made this order:

"On motion of defendant it is hereby ordered and decreed that the defendant have to and including the 10th day of July, 1915, within which to file a transcript of the testimony and proceedings had in the above entitled cause with the clerk of the supreme court of the State of Oregon."

The transcript was filed July 8th. Plaintiff now moves to dismiss the appeal for the reason that this transcript was not filed within the time required by law. The decision of this motion must turn on the meaning of the word "proceedings," as this court held in *Robinson* v. *Robinson Cheese Co.,* 50 Or. 453 (93 Pac. 253), that time given in which to file a bill of exceptions does not extend the time for filing a transcript. In *Ex parte McGee,* 33 Or. 165 (54 Pac. 1091), this court defined the word "proceedings" thus:

" 'Proceeding' is defined by Black as follows: 'In a general sense, the form and manner of conducting judicial business before a court or judicial officers; regular and orderly progress in form of law; including all possible steps in an action, from its commencement to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object': Black Law. Dict. Bouvier defines it thus: 'In its general acceptation, this word means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, of opposing judgments, and of executing them.' Bouv. Law Dict. Duer, J., in *Rich* v. *Husson,* 1 Duer, 617, says: 'The word "proceeding," both in its popular use and in its technical application, has a definite meaning, which we cannot alter or enlarge. It means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right. A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode

of action for carrying into effect a legal right, and, so far from involving any consideration or determination of the right, presupposes its existence. The proceeding follows the right. The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is law which gives a right to costs, and fixes their amount. It is procedure which declares when and by whom the costs to which a party has a previous title shall be adjusted or taxed, and when by whose direction a judgment in his favor shall be entered.' In *Wilson* v. *Allen,* 3 How. Pr. 369, the court being authorized at any time, in furtherance of justice, to amend any pleading or proceeding by correcting a mistake in any respect, it was held that the use of the term 'proceeding' in that connection authorized the allowance of an amendment of an undertaking on appeal. So, in *Langstaff* v. *Miles,* 5 Mont. 554 (6 Pac. 356), it was held, under a similar statutory authorization, that the court was empowered to allow an amendment of an undertaking for an attachment. So, in *Reg.* v. *London, C. & D. Ry. Co.,* L. R. 3 Q. B. 170, it was held that the taxation of costs was a proceeding within a statute which provided, in effect, that, from and after the passing of a certain act, no actions, suits, attachments, executions, or other proceedings against a railroad company therein named should be commenced or continued. And in *Smith* v. *Bank,* 5 Pet. 518 (8 L. Ed. 212), and *Ward* v. *Cohen,* 3 S. C. 338, it is said that proceedings of the sheriff under execution are part of the proceedings in the cause. For other cases illustrating the application, import, and general scope of the term, see *Hine* v. *Belden,* 27 Conn. 384; *Williamson* v. *Champlin,* Clarke Ch. (N. Y.) 9; *Bonesteel* v. *Orvis,* 31 Wis. 117; *Hogan* v. *Hoyt,* 37 N. Y. 300."

The tendency of all the decisions of this court has been not to dismiss an appeal seemingly prosecuted in good faith if by any reasonable intendment the appeal could be held good. Tested by the rule quoted

above, we think the word "proceedings" is broad enough to cover the transcript; and the motion to dismiss is denied. MOTION DENIED.

NOTE.—Appeal dismissed on stipulation September 4, 1917. REPORTER.

Argued May 31, reversed and remanded July 3, rehearing denied July 24, motion to recall mandate denied September 11, 1917.

ASKAY *v.* MALONEY.*

(166 Pac. 29.)

Arrest—Use of Force—Police Officer.

1. Police detectives, having arrested one who they had reason to believe, and evidently believed, had committed a felony, had the right, when he broke away, to use such means and degree of force as were reasonably necessary to recapture him, including shooting at him, if without evil design and under circumstances of imperative duty.

[As to what constitutes arrest and what may be done to accomplish it, see note in 61 **Am. Dec.** 151.]

Municipal Corporations—Police Detective—Negligent Shooting—Liability.

2. Although a police officer might justifiably discharge a weapon to recapture an escaping prisoner, yet if the shooting were done in a public place, where the police officer should have known that people were likely to congregate or pass, it might constitute such negligence as to render the officer civilly liable for such injury as he might inflict upon an innocent person.

Evidence—Judicial Notice—Expectancy of Life.

3. Without offering in evidence accepted standards of mortality tables to show the expectancy of life, a court will take judicial notice of the average duration of the life of a healthy person of the age of one whose death is under consideration.

Trial—Instructions—Requests for.

4. In an action for death, for the jury to have the benefit of knowledge derived from mortality tables, plaintiff's counsel should request an instruction giving information on that subject.

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*On the general rule as to use of force in making arrest in case of felony, see note in 67 **L. R. A.** 297.

On liability of sureties on bond of peace officer for latter's act in killing or injuring one person while attempting to execute criminal process against another, see note in 29 **L. R. A. (N. S.)** 463.

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Trial—Instructions—Abstract Instructions.

5. In action for wrongful death, an instruction as to damages, considering deceased's age, habits, etc., not based on any evidence as to most of the elements adverted to, was abstract, and therefore erroneous.

Municipal Corporations—Police Officers—Liability on Bond.

6. In action against police detectives and their surety for death from accidental shooting of deceased as the detectives were recapturing an escaping prisoner, it was not error to refuse to require plaintiff to elect the officer who caused the injury, where it appeared that both officers were firing shots.

Municipal Corporations—Police Officers—Liability on Bond.

7. Under Sections 348, 349, L. O. L., as to bonds of city officers, and allowing action thereon by the one injured by the principal's delinquency, a surety company bonding city detectives was properly joined in action against them for death from their negligent shooting; and a prior judgment against the principals and satisfaction by them was unnecessary, for, the bond having been given under the statutes, it was an official bond, and deemed to give the statutory remedy.

Jury—Examination of Jurors.

8. Where a corporate bonding company was a proper party defendant, it was not error to permit persons called as jurors to state, over objection and exceptions, upon their *voir dire*, that they were not, and never had been, interested in indemnity security companies.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action by T. M. Askay against P. R. Maloney, T. Swennes, and the Southwestern Surety Insurance Company, a corporation, to recover damages for the death of plaintiff's son, Walter E. Askay, which was caused by a gunshot wound. The material facts are that after dark, on December 25, 1914, W. Hines was assaulted upon a street in Portland, Oregon, by two colored men who forcibly took from him a watch and some money. He reported the loss to the city police department, and the defendants, detectives Maloney and Swennes, were detailed to investigate the case. They, with Hines, went to the vicinity of the robbery, where in a saloon they found two men, one of whom, John Jones, was recognized

by Hines as his assailant. The officers arrested both men and found in Jones' pocket a watch which Hines identified as having been taken from him. Jones in charge of Maloney and the other man in the custody of Swennes, accompanied by Hines, about 10 o'clock at night, started walking to the city jail. When they reached the corner of Oak and Sixth Streets Jones broke away and ran north on the east side of Sixth Street, pursued by Maloney. Thereupon Hines took charge of the other man, whom he conducted to the municipal prison, and Swennes joined in the chase. The streets being slippery from falling rain Jones and Maloney fell as each turned east on the south side of Pine Street. Jones, hastily rising, continued his journey, when Maloney, getting upon his feet, commanded the fleeing man to halt, telling him that if he did not obey he would be shot. Paying no heed to the order Jones turned northeasterly toward a covered wagon standing near the center of the block and continued running east on the north side of Pine Street, when Maloney shot twice at him with a revolver. Thereupon Swennes, having overtaken Maloney, also fired two shots from a revolver at Jones. In the meantime, an electric car, unobserved by either officer, was crossing Pine Street going north on the east side of Fifth Street, and evidently one of the bullets so discharged, piercing a window of the car, struck Walter E. Askay in the neck. Jones again slipped and fell as he undertook to cross Fifth Street, and was caught by the officers beside the car as it halted on the north side of Pine Street to remove the injured passenger, who was taken to a hospital, where he died from the effects of the wound. Jones having been tried for and convicted of the robbery was sentenced to a term of imprisonment in the state penitentiary.

Pursuant to a clause of the charter of Portland requiring police detectives to give a bond in the sum of $1,000, the defendant, the Southwestern Surety Insurance Company, for a valuable consideration, executed an undertaking to reimburse the city or any person for loss sustained by reason of the failure of Maloney or Swennes faithfully to discharge his duties, and to make payment, to the extent of $1,000 each, of damages that might be adjudged against either officer by any tribunal for the illegal arrest, imprisonment, or injury by him of any person.

The complaint alleges that the plaintiff was duly appointed administrator of his son's estate, and thereupon obtained from the trial court leave to institute this action against all the defendants. The facts hereinbefore detailed are substantially set forth in the complaint, which charges, in effect, that the intersection of Pine and Sixth Streets is a business section of the city, and that while Maloney and Swennes knew persons were passing at that place at all hours of the day and night, and that cars on Fifth Street crossed Pine Street at regular intervals carrying passengers, these officers carelessly and negligently discharged their weapons in such locality thereby causing the death of the deceased, to the damage of his estate in the sum of $7,500. Judgment was demanded against the police detectives and each of them for $5,500 and against the Southwestern Surety Insurance Company for the further sum of $2,000.

Motions to strike out parts of the complaint and to make that pleading more definite and certain by alleging whether Maloney or Swennes fired the shot that caused the injury were denied. Each defendant thereupon separately demurred to the complaint on the ground that it did not state facts sufficient to con-

stitute a cause of action. These demurrers having been overruled, the Southwestern Surety Insurance Company declined further to plead. Maloney and Swennes, however, separately answered denying the material averments of the complaint, and for further defenses allege, in effect, that in order to recapture Jones, who had committed a felony in Portland, Oregon, it became necessary to shoot at him, and that with due care and caution these defendants, as officers authorized to make the arrest, shot at the fleeing man, but in doing so they did not use any more force than was essential to catch the escaped prisoner, which discharge of weapons is the shooting alleged in the complaint.

Replies put in issue the allegations of new matter in the answers, and the cause coming on for trial the plaintiff introduced his evidence in chief. Whereupon counsel for Maloney and Swennes separately moved for a judgment of nonsuit on the ground that no testimony had been offered tending to show that either officer was negligent. These motions were denied and exceptions taken. When the cause was finally submitted, defendants' counsel requested the court to direct a verdict in favor of their clients on substantially the same grounds as last stated, which request was denied, and an exception saved. The jury, complying with the court's interrogatory, "Were the police officers warranted under the instructions which I have given you in firing upon the man John Jones, the man accused of robbery?" answered, "Yes." Verdicts were returned against Maloney and Swennes for $1,000, and against the Southwestern Surety Insurance Company upon its undertaking in behalf of such officers in the sum of $500 each. A

judgment having been rendered in accordance with the verdicts, the defendants jointly appeal.

REVERSED AND REMANDED.

For appellants, Mr. Patrick R. Maloney and Mr. Tom Swennes, there was a brief over the names of *Mr. Henry J. Bigger* and *Mr. Stanley Myers,* with an oral argument by *Mr. Bigger.*

For appellant, Southwestern Surety Insurance Company, there was a brief submitted by *Mr. Chester V. Dolph.*

For respondent, there was a brief over the names of *Messrs. Richards & Richards,* and *Mr. Coy Burnett,* with oral arguments by *Messrs. Richards & Richards.*

MR. JUSTICE MOORE delivered the opinion of the court.

1, 2. It is contended that the special finding by the jury absolves the defendants from all civil liability, and this being so errors were committed in receiving the general verdicts and in rendering judgment thereon. A careful reading of the instructions given to the jury induces the belief that the word "warranted" as used by the court in its interrogatory was intended to be understood as "justified." Maloney and Swennes, as members of the police force of Portland, Oregon, having reason to believe, and evidently believing, that a felony had been committed in that city, and that Jones was guilty thereof, had the right to use such means and degree of force as were reasonably necessary to recapture him, and if they intentionally, but without evil design and under such circumstances of duty as to render their acts proper and to relieve them from any shadow of blame criminally, shot at him,

they were justified in doing so. Though a peace officer might discharge a weapon under the circumstances stated and his act be justified, if, however, the shooting were done in a public place where the officer understood or should have known people were in the habit of congregating or were likely to pass, the act might constitute such negligence as to render the officer civilly liable for any injury that he might inflict upon an innocent person. For a general discussion of this and kindred subjects, see *Brown* v. *Kendall,* 6 Cush. (60 Mass.) 292; *Morris* v. *Platt,* 32 Conn. 75; *Paxton* v. *Boyer,* 67 Ill. 132 (16 Am. Rep. 615); *Shaw* v. *Lord,* 41 Okl. 347 (137 Pac. 885, Ann. Cas. 1916C, 1147, 50 L. R. A. (N. S.) 1069). The acts of the officers so far as they related to Jones were evidently "warranted" in using the force employed to recapture him. While this conclusion is reasonably deducible from the evidence as specially found by the jury, their answer to the question propounded to them by the court does not inevitably show that the detectives were blameless civilly in shooting in a place where they knew or should have known street-cars were passing at regular intervals. No error was committed in treating the special finding as advisory only.

3, 4. An exception was taken to a part of the court's charge, and it is maintained that an error was committed in instructing the jury as follows:

"You will, therefore, take into consideration what you know of Walter Askay as it has been developed in the testimony, considering his age, his habits of industry, his habits of sobriety, his habits of saving. What would he, from his physical and intellectual abilities, have acquired if he had finished out his life? The elements which I have given to you of a sentimental nature are, of course, to be taken out of the case and not to be considered. It is the value of the

estate. That is what is sued for here, and that is the amount which must be given. Then award the plaintiff the amount which you think he is entitled to receive against Mr. Maloney and Mr. Swennes, and the amount which you think should be recovered against the insurance company."

The objection thus urged is not against the language so employed, which is a fair exposition of the rule generally applicable to a case of this kind, but it is insisted by defendants' counsel that no testimony was offered tending in any manner to substantiate most of the elements adverted to by the court as the basis to be considered in estimating and measuring the damages to be awarded, thereby rendering the instruction improper. A careful examination of the entire testimony given at the trial, a transcript of which is duly certified to and made a part of the bill of exceptions, shows that Walter S. Askay would have been 21 years old if he had lived until the month following his injury; that he was employed at Portland, Oregon, by the proprietors of a large department store to drive a delivery vehicle, for which service he was paid $52 a month; and that he took his meals and lodged at a boarding-house, but what he paid therefor is not disclosed. This includes the entire testimony upon which the instruction so challenged is based. It will be assumed that as in this case without offering in evidence accepted standards of mortality tables to show the expectancy of life of Walter S. Askay, the court would have taken judicial notice of the average duration of a healthy person of the age of the deceased at the time he was shot: 16 Cyc. 871; *Lanfear* v. *Mestier,* 18 La. Ann. 497 (89 Am. Dec. 658, 694). In order that the jury might have had the benefit of such knowledge, however, they should

have been informed on that subject, thereby imposing upon plaintiff's counsel the duty of requesting an instruction in relation thereto.

5. In *Morrison* v. *McAtee,* 23 Or. 530, 536 (32 Pac. 400), Mr. Justice BEAN, referring to standard mortality tables showing the expectation of life of a person at a given age, observes:

"They are simply the result of calculations based upon a certain average rate of mortality as shown by experience, and assuming that all of the same age are of equal value. But the constitution, habits, and health of individuals differ essentially, and this must be taken into consideration in estimating the probable length of life of any given person, and, therefore, no ordinary table of expectation of life, although it may offer much valuable information, can alone be taken as a correct rule for estimating the value of the life of any particular individual."

In the trial of a cause before a jury the judge cannot usually give constant attention to the reception of the entire evidence for some thought must be bestowed upon the preparation of instructions appropriate to the issues and consonant with the testimony necessary to substantiate the averments of the respective parties, and for that reason it is sometimes assumed, as was evidently done in this instance, that the requisite proof had been made and the jury charged in relation thereto. Such instructions, however correctly they may announce the legal principle involved by the pleadings, are abstract when not supported by any evidence, and hence they are erroneous: *Morris* v. *Perkins,* 6 Or. 350; *Glenn* v. *Savage,* 14 Or. 567 (13 Pac. 442); *Bailey* v. *Davis,* 19 Or. 217 (23 Pac. 881); *Bowen* v. *Clarke,* 22 Or. 566 (30 Pac. 430, 29 Am. St. Rep. 625); *Geldard* v. *Marshall,* 47 Or. 271

(83 Pac. 867, 84 Pac. 803); *Olsen* v. *Silverton Lumber Co.*, 67 Or. 167 (135 Pac. 752).

In view of the conclusion thus reached it is deemed important to consider some questions that may again arise. Thus it is certain that both police detectives could not have discharged the single bullet which caused the resulting death. In *Wert* v. *Potts*, 76 Iowa, 612, 614 (41 N. W. 374, 14 Am. St. Rep. 252), it was held that where several parties were lawfully engaged in the common purpose of making an arrest, and one of them in furtherance of such design, but without the concurrence of his associates, committed a tort, the others were not liable therefor. In deciding that case Mr. Justice BECK remarks:

"Surely, no one is ready to claim that officers and others, acting in concert in making a lawful arrest, are liable for the unlawful act of one of their number, done without their concurrence."

To the same effect see *Richardson* v. *Emerson*, 3 Wis. 319 (62 Am. Dec. 694).

6. In the case at bar there was at least a tacit concurrence in the commission of the alleged tort, for it will be remembered that both officers were discharging their revolvers in an attempt to effect the recapture of Jones when one of the bullets struck a passenger on a street-car. It is unquestionably important to the Southwestern Surety Insurance Company that the jury should find, if possible, whether Maloney or Swennes fired the shot which caused the injury, for if only one of the officers was guilty of negligence in discharging his weapon in the direction of where he must have known street-cars would pass at regular intervals, the greatest judgment that could be rendered against the surety company is necessarily limited to the sum of $1,000, the amount of the indemnity

specified in the bond. If, however, the jury will be unable certainly to determine this question from the evidence to be received, the plaintiff should not be denied any relief because of his inability to identify the police detective who fired the fatal shot when both officers were discharging their revolvers and when it is borne in mind that the surety company executed the indemnity undertaking for a consideration. No error was committed in denying the motion to require the plaintiff to elect the officer who caused the injury.

7. The motion of the Southwestern Surety Insurance Company to strike from the complaint all reference to the giving of a bond on behalf of the police detectives on the ground that such allegations were irrelevant and the demurrer to that pleading for that it did not state facts sufficient to constitute a cause of action were predicated on the assumption that the surety company, by express stipulation contained in the undertaking, was not primarily liable nor even amenable until a judgment rendered against those officers had not been discharged by them. Section 152 of the charter of the City of Portland, as amended June 3, 1907, requires every detective to give a bond in the sum of $1,000

"for the faithful discharge of his duties, and the payment of any damage that may be adjudged against him by any tribunal for the illegal arrest, imprisonment, or injury by him to any person."

The undertaking given by the surety company on behalf of Maloney and of Swennes, who with others are named as the officers for the faithful performance of whose several duties the bond was executed, complies with the requirements of the clause of the municipal charter mentioned. This undertaking was, therefore, an official bond: Murfree, Official Bonds, § 35.

"Official bonds will not be declared invalid by the courts, except on the most satisfactory grounds": 4 R. C. L. 53.

"Except where the statute, either expressly or impliedly, declares all bonds void which do not strictly comply with the requirements therein prescribed, a bond need not be in the exact words of the statute, and the fact that it slightly varies from the form prescribed will not invalidate it, provided it includes substantially all that the statute requires, that is, such obligations as are imposed by the statute, and allows every defense given by law, as where it is more specific than the statute requires but imposes no additional obligation": 9 C. J. 24.

To the same effect see: 2 Brandt, Suretyship Guaranty (3 ed.), § 664; 5 Cyc. 754; *Growbarger* v. *United States Fidelity & G. Co.,* 126 Ky. 118 (102 S. W. 873, 128 Am. St. Rep. 274, 11 L. R. A. (N. S.) 758); *Martin* v. *Smith,* 136 Ky. 804 (125 S. W. 249, 29 L. R. A. (N. S.) 463); *Lee* v. *Charmley,* 20 N. D. 570 (129 N. W. 448, 33 L. R. A. (N. S.) 275).

Our statute declares:

"The official undertaking or other security of a public officer to the * * city * * shall be deemed a security to the * * city * * and also to all persons severally for the official delinquencies against which it is intended to provide": Section 348, L. O. L.

"When a public officer by official misconduct or neglect of duty shall forfeit his official undertaking or other security, or render his sureties thereon liable upon such undertaking or other security, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name, against the officer and his sureties, to recover the amount to which he may by reason thereof be entitled": Section 349, L. O. L.

8. Though the motion and demurrer last referred to are, first, in the nature of an objection to the complaint for an alleged misjoinder, and, second, tantamount to a plea in abatement, they are without merit, and no error was committed in denying the motion or in overruling the demurrer. The Southwestern Surety Insurance Company thus being a proper party defendant no error was committed in permitting persons called as jurors to state, over objection and exception, upon their *voir dire* that they were not and never had been interested in indemnity security companies.

For the error committed in giving the instruction hereinbefore set forth the judgment is reversed and a new trial ordered. REVERSED AND REMANDED.

REHEARING DENIED.

MOTION TO RECALL MANDATE DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued May 15, reversed June 26, motion to retax costs granted September 11, 1917.

MAXSON *v.* ASHLAND IRON WORKS.*

(166 Pac. 37; 167 Pac. 271.)

Evidence—Replevin—Value of Property—Presumption—Burden of Proof—Statute.

1. In an action to recover possession of sawmill machinery exchanged for lumber by plaintiff with defendant's mortgagor under an agreement that the machinery was worth $500, the presumption of continuance, prescribed by Section 799, subdivision 33, L. O. L., afforded *prima facie* evidence of the value of the property at the time

*On rights of seller of chattel, retaining title thereto or a lien thereon, as against existing mortgagees of the realty to which it is affixed by the owner, see note in 37 **L. R. A. (N. S.)** 119.

On effect of agreement to prevent fixtures from becoming part of realty as to prior mortgages, see note in 19 **L. R. A.** 444.

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of the trial, imposing on defendant the burden of disproving such value, and, though plaintiff did not give testimony as to the value of the machinery, nonsuit was properly refused.

Evidence—Parol Evidence Affecting Writing—Statute.

2. Under Section 713, L. O. L., providing that where the terms of an agreement have been reduced to writing, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, with two exceptions, in an action to recover possession of sawmill machinery by plaintiff who exchanged it for lumber with defendant's mortgagor, evidence proving the intent of plaintiff and defendant's mortgagor, in respect to the writing between them, the execution of which plaintiff claimed resulted from the mistake of the scrivener was inadmissible.

Sales—Conditional Sale—Retention of Possession.

3. Where plaintiff agreed to sell sawmill machinery to defendant's mortgagor, and the latter agreed to give lumber in payment, it being agreed that plaintiff should retain "possession" of the machinery until it was fully paid for in lumber, the written contract, embodying such terms, did not evidence a conditional sale.

Sales—Conditional Sale—Recordation of Contract—Statute.

4. By Section 7414, L. O. L., it is unnecessary to the validity of a conditional sale that the contract be recorded, unless the property, title to which has been reserved, has been so attached to realty as to become a fixture.

Fixtures—Removal.

5. Personal property is not so attached to realty as to become a fixture if it can be removed without material injury to the property or to the freehold.

Fixtures—Realty.

6. In an action to recover sawmill machinery by plaintiff, who sold it to defendant's mortgagor, defendant's title being derived from foreclosure of a chattel mortgage, no question could arise as to fixtures; defendant's right to the machinery being unconnected with any realty.

[As to when and against whom fixtures may retain character of personal property, see note in 84 **Am. St. Rep.** 877.]

Sales—Action Against Mortgagee of Conditional Vendee—Remittitur.

7. Where verdict and judgment were rendered for plaintiff, in his action of replevin, that he was the owner of the demanded machinery, and entitled to immediate possession or a recovery of $500 as its value, the trial court could not require plaintiff to remit part of the amount on the ground that he had received such part of the purchase price of the machinery conditionally sold to defendant's mortgagor.

Action—Law and Equity.

8. Under a statute recognizing a clear distinction between actions at law and suits in equity, an award of a remainder due on a conditional contract could not be determined in replevin.

Costs—On Appeal—Reversal.

9. Although both parties appeal, where the reversal of the judgment operated to defendant's advantage, it was entitled to costs and disbursements.

From Jackson: FRANK M. CALKINS, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

This is an action by F. H. Maxson against the Ashland Iron Works, a corporation, to recover the possession of 1 planer, 1 resaw, 1 cut-off saw, 1 rip-saw, 30 feet of shafting, belting, and pulleys, or the sum of $500 as the alleged value thereof in case possession cannot be secured. The complaint is in the usual form and alleges *inter alia* that after a demand therefor by the plaintiff the defendant refused to surrender the possession of any of the property, but unlawfully detains it in Jackson County, Oregon.

The answer denied the material averments of the complaint, and for a further defense alleged in effect that, on January 12, 1915, all the property so described was owned by and in the possession of T. H. Johnson, in whose sawmill it was then installed and attached as a fixture; that on the date mentioned Johnson and his wife executed to the defendant a chattel mortgage of such machinery, which mortgage was duly recorded nine days after it was executed; that on July 12, 1915, such mortgage then being due and unpaid, the defendant caused it to be foreclosed in the manner prescribed, and after giving due notice purchased such property at a public sale thereof, and the defendant then became, ever since had been, and then was the owner and entitled to the possession of such machinery.

The reply put in issue the allegations of new matter in the answer, and the cause having been tried resulted in a verdict and judgment to the effect that the plain-

tiff was the owner of the demanded property and entitled to the immediate possession thereof, the value of which was assessed by the jury at $500. Within the time limited the court

"ordered that unless plaintiff should remit $300 of the value in said judgment on or before December 15, 1915, a new trial would be granted for the reason that plaintiff testified he had received $300 on his contract and the court should have instructed the jury that the value should not exceed $200 in the verdict."

The order not having been complied with the verdict and judgment were set aside and a new trial granted, from which latter judgment each party separately appeals. REVERSED.

For appellant there was a brief over the names of *Mr. F. J. Newman* and *Mr. T. W. Miles,* with an oral argument by *Mr. Newman.*

For respondent there was a brief and an oral argument by *Mr. W. E. Crews.*

MR. JUSTICE MOORE delivered the opinion of the court.

A copy of all the evidence given at the trial is made a part of the bill of exceptions herein. From such transcript it appears that an agreement was concluded as follows:

"Made in Duplicate.

"Exchange Contract.

"This contract, made and entered into this 28th day of July, 1914, by and between F. H. Maxson of the County of Jackson and State of Oregon, party of the first part, and T. H. Johnson of the County of Jackson and State of Oregon, party of the second part, witnesseth: That the said party of the first part agrees

to sell to the party of the second part the following described personal property, to-wit: One planer, one resaw, one cut-off saw, one rip saw, thirty foot of shafting, belting, and pulleys. The said above property to be valued at $500. The above described property to be free and clear of all incumbrances. The said party of the second part hereby agrees to give in payment for the above described property dimension lumber at $9.00 a thousand feet and inch lumber at $10.00 a thousand feet to the amount of $500.00. The above lumber to be free and clear of all incumbrance. It is further agreed by and between the parties hereto that any balance due either of the parties shall be paid in cash. It is also further agreed by and between the parties that the party of the first part is to retain possession of the above described machinery until fully paid for in lumber.

"Witness our hands this 28th day of July, 1914.

"F. H. MAXSON.
"T. H. JOHNSON.

"In presence of
"E. ADAMSON.

"State of Oregon,
County of Jackson,—ss.

"Subscribed and sworn to before me this 28th day of July, 1914.

"E. ADAMSON,
"(Notarial seal.) Notary Public for Oregon."

This agreement was never recorded. Mr. Maxson assisted in removing the machinery about eight miles to Johnson's sawmill, where it was installed.

The evidence also shows that Johnson purchased from the defendant sawmill machinery of the value of $925, and he and his wife, on January 12, 1915, executed to the corporation a promissory note for that sum, $325 of which was payable June 1st of that year, $300 three months thereafter, and the remainder June

1, 1916, with interest at seven per cent per annum. The note contained a clause to the effect that default in the payment of any installment should immediately render the whole sum due and payable at the option of the holder. In order to secure the payment of the note the makers thereof at the same time executed to the defendant herein a chattel mortgage of all the machinery in the sawmill, including that which had been delivered by Maxson. The mortgage was recorded January 21, 1915.

Without the consent of either party hereto Johnson sold the resaw to persons who took it to Talent, Oregon, where it was installed in a mill. By consideration of the federal court of Oregon a decree of bankruptcy was rendered against Johnson, who thereupon departed from the state. Pursuant to written notice an officer took possession of the machinery in Johnson's sawmill in order to foreclose the chattel mortgage, no part of which had been paid and the first installment having matured. This action was then commenced, after notice had been served upon the defendant to surrender possession of the machinery Maxson had delivered, which demand was not complied with, and the defendant gave an undertaking and caused the property to be sold under the foreclosure, becoming the purchaser of the machinery.

The plaintiff as a witness in his own behalf testified in referring to the machinery:

"Q. What was the value of the property?

"A. Five hundred dollars. * *

"Q. About what portion of the lumber had you received?

"A. Well, I think I had somewheres about 30,000 feet that I received. * *

"Q. The amount of the lumber you received would be of what value according to this contract?

"A. Well, it would amount to a little over $300, somewhere along there."

1. The foregoing statement of facts is deemed sufficient to explain the legal principles involved. Considering first the appeal of the defendant, its counsel contend that an error was committed in denying a motion for a judgment of nonsuit, interposed when the plaintiff had introduced his evidence and rested, on the ground that no testimony had been given tending to show the value of the demanded machinery at the time of the trial. The testimony given by Maxson to the effect that the machinery was of the value of $500 evidently related to the estimated worth of the property at the time he concluded the contract with Johnson. The statute requires that if the plaintiff, as in this instance, has not obtained possession of the property, the jury shall assess its value if they return a verdict in his favor: Section 153, L. O. L. In denying the motion referred to the court invoked the disputable presumption, "that a thing once proved to exist continues as long as is usual with things of that nature" (Section 799, subd. 33, L. O. L.), and held that since it appeared the machinery was of the value of $500 on July 28, 1914, when the exchange contract was made, it necessarily followed from the deduction which the law expressly directs to be made from particular facts that such worth remained the same October 26, 1915, when this cause was tried. It has been held that the presumption relied upon does not apply in cases of money which a party may previously have had in his possession: *Hammer* v. *Downing,* 41 Or. 234 (66 Pac. 916); *State ex rel.* v. *Gutridge,* 46 Or. 215 (80 Pac. 98); *State* v. *Rider,* 78 Or. 318 (145 Pac. 1056, 152 Pac.

497); *Weigar* v. *Steen,* 81 Or. 72 (158 Pac. 280). In case of sawmill machinery, however, of the kind here described, the presumption of continuance notwithstanding its use is reasonably to be inferred; and this being so the conclusion which the law prescribes afforded *prima facie* evidence of the worth of the property at the time of the trial, thereby imposing upon the defendant the burden of disproving such value. No error was committed in refusing to grant a judgment of nonsuit.

The plaintiff, over objection and exception, was permitted to introduce testimony tending to show that in preparing the contract for an exchange of the machinery for lumber the word "possession" was inadvertently used in the clause for the term "title," and it is insisted by defendant's counsel that an error was committed in this respect. Mr. Maxson, referring to the man who prepared the agreement testified as follows:

"I told Mr. Adamson that I wanted a contract drawed that I could own the machinery until it was paid for."

This sworn declaration is corroborated by Mr. Adamson, who testified:

"When I drew this contract I understood that the title was to remain in Mr. Maxson until the lumber was delivered, that he was to get so many thousand feet of lumber for this machinery, and that the title was to remain in him until fully paid for."

The testimony of these witnesses seems to be substantiated by the phrase "agrees to sell," as used in the exchange agreement.

"Where the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and, therefore, there can be, between the parties and their representatives or

successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings; (2) where the validity of the agreement is the fact in dispute": Section 713, L. O. L.

2, 3. The defendant must necessarily claim as a representative or successor in interest of the plaintiff in respect to the demanded machinery. In such case evidence was inadmissible to prove the intent of the contracting parties in respect to the writing, the execution of which, it is asserted, resulted from the mistake of the scrivener: *Pacific Biscuit Co.* v. *Dugger,* 42 Or. 513 (70 Pac. 523); *Smith* v. *Farmers & Merchants' Nat. Bank,* 57 Or. 82 (110 Pac. 410); *Muir* v. *Morris,* 80 Or. 378 (154 Pac. 117, 157 Pac. 785). An error was committed in this respect. The word "title" cannot be substituted for the term "possession," as used in the writing, and hence the exchange contract does not evidence a conditional sale: *Singer Mfg. Co.* v. *Graham,* 8 Or. 17 (34 Am. Rep. 572); *Rosendorf* v. *Baker,* 8 Or. 240; *Schneider* v. *Lee,* 33 Or. 578 (17 Pac. 269); *Christenson* v. *Nelson,* 38 Or. 473 (63 Pac. 648); *Herring-Marvin Co.* v. *Smith,* 43 Or. 315 (72 Pac. 704, 73 Pac. 340); *McDaniel* v. *Chiaramonte,* 61 Or. 403 (122 Pac. 33); *Francis* v. *Bohart,* 76 Or. 1 (143 Pac. 920, 147 Pac. 955, L. R. A. 1916A, 922).

4–6. It is maintained by defendant's counsel that an error was committed in refusing to direct a verdict in favor of their client when the cause was submitted. It is argued that the machinery delivered by Maxson to Johnson was installed in the latter's mill, thereby becoming a fixture, and as the plaintiff did not cause his contract to be recorded, and the evidence shows the defendant secured its chattel mortgage without notice

or knowledge of the pre-existing agreement, the jury should have been instructed as requested. It is unnecessary to the validity of a conditional sale that the contract therefor should be recorded unless the property, the title to which has been reserved, has been so attached to any real estate as to become a fixture thereto: Section 7414, L. O. L. Personal property is not so attached if it can be removed without material injury to the articles themselves or to the freehold: *Henkle* v. *Dillon,* 15 Or. 610 (17 Pac. 148); *Landigan* v. *Mayer,* 32 Or. 245 (51 Pac. 649, 67 Am. St. Rep. 521); *Hershberger* v. *Johnson,* 37 Or. 109 (60 Pac. 838); *Washburn* v. *Inter-Mountain Min. Co.,* 56 Or. 578 (109 Pac. 382, Ann. Cas. 1912C, 357). The testimony offered at the trial does not show that the machinery delivered by the plaintiff could not have been removed from Johnson's sawmill without inflicting the degree of injury adverted to; and hence no error was committed as alleged. Aside from this, as the defendant's title is derived from a foreclosure of a chattel mortgage, no question can arise as to fixtures since the right to the machinery is not connected with any real estate.

Considering the plaintiff's appeal it is contended that an error was committed in setting aside the verdict and judgment and granting a new trial. The question thus presented is whether or not such a mistake of law was perpetrated at the trial as would have necessitated a reversal of the original judgment if an appeal had been taken, thereby authorizing the court to act as complained of: *De Vall* v. *De Vall,* 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A. (N. S.) 291); *Taylor* v. *Taylor,* 61 Or. 257 (121 Pac. 431, 964); *Smith & Bros. Typewriter Co.* v. *Mc-*

George, 72 Or. 523 (143 Pac. 905); *Frederick & Nelson* v. *Bard,* 74 Or. 457 (145 Pac. 669); *Delovage* v. *Old Oregon Creamery Co.,* 76 Or. 430 (147 Pac. 392, 149 Pac. 317); *Pullen* v. *Eugene,* 77 Or. 320 (146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474). Could the court, therefore, in an action of replevin try the cause as a suit in equity, consider the conditional sale as equivalent to a chattel mortgage, and regard the plaintiff's attempt to recover the machinery as an effort on his part to obtain and hold possession of the property as security for $200, the remainder due him? It is generally held that where personal property is sold on credit and the title to the goods is retained by the vendor until the price is paid he may upon a breach of the conditions treat the sale either as absolute and sue for the consideration agreed to be paid or he may regard the sale as canceled and recover the property: 6 Am. & Eng. Ency. Law (2 ed.), 480; 35 Cyc. 696; *Sanders* v. *Newton,* 140 Ala. 335 (1 Ann. Cas. 267, 37 South. 340); *American Soda Fountain Co.* v. *Gerrer's Bakery,* 14 Okl. 258 (78 Pac. 115, 2 Ann. Cas. 318); *American Process Co.* v. *Florida White Pressed Brick Co.,* 56 Fla. 116 (47 South. 942, 16 Ann. Cas. 1054).

Another choice of remedies is recognized in some states of the Union where the rule prevails that a vendor, without rescinding the agreement, may resume possession of the goods, hold them subject to the contract, and enforce its performance against the vendee, who, upon payment of the purchase price, is entitled to a restoration of the property: 1 Mechem, Sales, § 615. Thus as illustrating a choice of the latter remedy it was held in *Hamilton* v. *Highlands,* 144 N. C. 279 (56 S. E. 929, 12 Ann. Cas. 876), that under a contract of conditional sale a default in the payment of a

part of the installments, and the continued possession of the property beyond the specified term, did not give the vendor the right to recover the remainder of the consideration and to retake possession of the goods, but that the measure of the relief was the sale of the property by the court and the payment to the vendor out of the proceeds of the remainder of the purchase price due him, together with interest, costs, etc., deducting the payments made and giving the surplus to the vendor, or in case of a deficiency to render judgment therefor against him. This remedy regards the vendor as holding the legal title to the property in trust for the vendee, whose equitable interest in the goods grows *pari passu* and is measured by the extent of the purchase price which has been paid. As a corollary, deducible from the principle of the latter remedy stated, the authority of the vendee to assign his interest in the property is recognized, subject, however, to the paramount right of the vendor, and permits the assignee, upon payment of the remainder of the purchase price, to succeed to the legal title freed from the reservation. Such procedure, however, is serviceable only in a court of equity or possibly where by statute an equitable defense is permitted to be interposed to a complaint in a law action, which practice was not available in Oregon when this cause was tried, nor until May 22, 1917, when the act amending Section 390, L. O. L., went into effect, apparently sanctioning such procedure: Laws 1917, Chap. 95.

In *Thirlby* v. *Rainbow,* 93 Mich. 164 (53 N. W. 159), a headnote reads:

"The question of the right of a vendee of personal property, the title to which was retained in the vendor until the payment of the purchase price, with the right to reduce it to possession in case of non-payment, to

recover the amount paid thereon in excess of what the vendor had a right to retain, cannot be tried in a replevin suit brought by the vendor after default in payment and refusal to surrender the property on demand."

To the same purport is the case of *Ryan* v. *Wayson,* 108 Mich. 519 (66 N. W. 370), where it was held that upon the failure of a vendee to comply with the terms of a conditional sale the vendor was entitled to the possession of the property, although there was no express provision to that effect, and that in an action of replevin by the vendor under such a contract a judgment in favor of the vendee for the excess of the value of the goods over the unpaid purchase price was unauthorized, since the vendee had no special interest in the goods even if entitled to treat the contract as rescinded, but at most he had only a personal claim against the vendor.

Whether the defendant after filing an answer to the complaint herein showing no defense existed at law could have interposed a cross-bill in equity and set up an equitable interest in the demanded machinery by reason of being subrogated to Johnson's right is not involved for no such proceedings were invoked. When the vendor has regained or is legally entitled to the possession of goods delivered under a contract of conditional sale, since the vendee's claim to recover any of the payments that he may have made on account of the purchase price of the property is only personal (*Ryan* v. *Wayson,* 108 Mich. 519 (66 N. W. 370), we do not wish to be understood as intimating that an equitable defense is now available in an action of this kind, even under the amendment of Section 390, L. O. L.

7. A verdict and judgment having been rendered for the plaintiff that he was the owner of the demanded

machinery and entitled to the immediate possession thereof, or to a recovery of $500 as its value, the court could not in an action of this kind legally require the plaintiff to remit any part of the sum so stated; but having done so the latter judgment is reversed and for the error first mentioned a new trial is ordered.

REVERSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT concur.

MR. JUSTICE MCCAMANT taking no part in the consideration of this case.

Costs retaxed September 11, 1917.

MOTION TO RETAX COSTS.

(167 Pac. 271.)

On motion to retax costs. Motion sustained and costs allowed in favor of defendant.

Mr. W. E. Crews, for the motion.

Mr. F. J. Newman and *Mr. T. W. Miles, contra.*

Department 2. MR. JUSTICE MOORE delivered the opinion of the court.

8, 9. This is a motion to retax costs. Though the plaintiff and the defendant appealed the judgment was reversed on the ground that an error had been committed in receiving testimony given by the plaintiff tending to vary the terms of the exchange contract by showing that the word "possession" as there employed was inadvertently used for the term "title," which the plaintiff was to retain until he had received the full

consideration for the machinery that he sold. As the defendant is the successor in interest of the plaintiff in respect to the demanded machinery the express language of the writing could not be changed in an action of this kind. What is said in the opinion relating to the demand for a remission of $300, in failing to comply with which the plaintiff's judgment was set aside and a new trial ordered, was intended to show that under a statute like ours, which recognizes a clear distinction between actions at law and suits in equity, an award of the remainder due on a conditional contract could not be determined in a replevin action. The reversal of the judgment operated to the advantage of the defendant, and it is entitled to the costs and disbursements which it has incurred. The mandate will, therefore, be recalled and corrected as here indicated. MOTION TO RETAX COSTS ALLOWED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BURNETT concur.

MR. JUSTICE MCCAMANT taking no part in the consideration of this case.

Argued May 14, reversed and remanded July 3, rehearing denied September 11, 1917.

COLBY *v.* CITY OF PORTLAND.*

(166 Pac. 537.)

Appeal and Error—Notice of Appeal—Parties to be Served—"Adverse Party."

1. In pedestrian's action against city and its officers for injuries, where the city went out on nonsuit, failure of the other defendants to serve notice of appeal on the city was not ground for dismissal

*On personal liability of highway officers for negligence, see notes in 22 L. R. A. 824; 52 L. R. A. (N. S.) 142; L. R. A. 1916B, 1186.
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of the appeal, in that the city was an "adverse party," within Section 550, L. O. L.

Municipal Corporation—Streets—Failure to Repair—Liability.

2. Under Portland city charter, empowering the council to make needful regulations to maintain public streets, it is the imperative duty of the city council to see that the streets are kept in good repair.

Municipal Corporations—Streets—Failure to Repair—Liability.

3. The duty of the city council of Portland to keep its streets in repair does not end with the passage of an ordinance requiring officers to examine into and report the condition of streets, but there must be some diligence to learn whether the officers perform the duties assigned.

Municipal Corporations—Streets—Failure to Repair—Liability.

4. The duty of a Portland councilman as to repair of streets, in the absence of actual knowledge of a defect, is performed when he has used his best efforts to provide means to keep streets in repair and to have a sufficient force of employees to report defects as they occur and to make the repairs.

Municipal Corporations—Streets—Failure to Repair—Liability.

5. The liability of each Portland officer for failure to make repairs to streets is personal, and depends upon the diligence which he himself exercises.

Officers—Negligence of Inferior Officer—Liability.

6. It is the universal rule that a public officer is not personally liable for the negligence of an inferior officer, unless he, having the power of selection, has failed to use ordinary care in the selection.

Municipal Corporations—Streets—Failure to Repair—Liability.

7. Section 281 of the charter of the City of Portland, which attempts to exempt the city from liability for injuries arising from defective streets and to place that liability upon the officer by reason of whose negligence the injury occurred, does not create any new or additional obligation as against such officer, as a city official who personally neglects to perform a specific duty was always liable, irrespective of any statute prescribing such liability.

[As to liability of municipal corporation for defects in, or failure to repair streets, see note in 103 **Am. St. Rep.** 257.]

Municipal Corporations—Streets—Failure to Repair—Liability.

8. Regardless of charter provision exempting City of Portland from liability for injuries to pedestrians by reason of defects in streets, the city is liable on the doctrine of *respondeat superior* for a failure of a street inspector to repair a defect which caused an accident.

Municipal Corporations—Streets—Failure to Repair—Liability.

9. While, before attempted exemption of City of Portland from liability for defects in streets, the negligence of its officers, either the council or subordinate officers, was imputable to it, such liability was not transferred to the shoulders of any city officer not actually or constructively negligent.

Municipal Corporations—Streets—Failure to Repair—Liability—Notice of Defects.

10. A defect in a street, which was noticed by only a few residents of the immediate community, though it had existed for several weeks, was not so notorious as that the city or its officers should have known thereof, so as to charge them with negligence in failing to make repairs.

Municipal Corporations—Streets—Failure to Maintain—Liability—Evidence—Admissibility.

11. Since it is the Portland city engineer's duty to inspect all streets and walks, in estimating his diligence, it is proper to show the mileage of streets in the city and the efforts made by him personally to secure a proper and complete inspection and repair.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Action by Victoria I. Colby against the City of Portland, a municipal corporation, H. E. Albee, Charles A. Bigelow, William L. Brewster, Robert G. Dieck, Will H. Daly and Phillip H. Dater. Reversed and remanded.

In Banc. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was an action for damages brought by the plaintiff against the City of Portland and other defendants, of whom Albee was mayor of the city, and Bigelow, Brewster, Dieck, and Daly, city commissioners, constituting the city council, and Dater, city engineer. The complaint after alleging the corporate existence of the city and the official character of the other defendants alleged:

"That section 16, article I, chapter III, of the charter of the said city of Portland, as revised by said council on August 19, 1914, provides as follows: 'All powers conferred and duties devolved by the sections of the charter of 1903, not repealed by this charter, upon the executive board, and water board, and other boards and commissions, abolished by this charter, shall, from and after the adoption of this charter, be exercised and performed by the council'; that section 18, article I, chapter III, of said charter, provides as

follows: 'The council shall have and exercise all powers and authority conferred upon the city of Portland by this charter or by general law, except where such power is herein expressly bestowed upon some other officer to the exclusion of the council'; that section 20, article I, chapter III, of said charter, provides as follows: 'The power and authority given to the municipal corporation of the city of Portland is hereby vested in a council, consisting of the mayor and four commissioners, subject to the initiative and referendum and other powers reserved to the people by the constitution of the state of Oregon, as defined and prescribed by the provisions of the constitution and general laws relating thereto, and by provision of this charter and ordinances enacted in pursuance thereto.' * * That the defendant, Phillip H. Dater, was at all times hereinafter mentioned, and is now, the duly appointed, elected, qualified, and acting city engineer of said city of Portland. * * That section 304 of the charter of said city of Portland, as amended, provides, *inter alia*, as follows: 'The city engineer shall keep himself informed of the condition of all public streets, squares, parks, grounds, highways, bridges, sewers, and street lights, and all plans and specifications for the construction, improvement or repairs thereof shall be made by him or under his supervision; and he shall have supervision of all surveys of streets, squares, and parks, and all construction, improvements, and repairs herein specified, whether such work be done by contract or otherwise. Before any ordinance is passed for the improvement of any street, highway, or elevated roadway he shall certify in writing to the council as to the suitability of such proposed improvement to the needs and requirements of the city; he shall see that the provisions of all contracts, ordinances, and regulations relating to the construction, improvement, and repair of streets and property herein designated are strictly complied with, and no claim for work as herein specified shall be allowed or paid out of the city treasury without the certificate of the city engineer that said work has been

done to his satisfaction; * * ' and said section further provides: 'The city engineer shall keep proper records of all matters relating to the business of his office and report to the executive board or other boards, commissions, or the council from time to time such suggestions and recommendations as to matters connected with his department as he may deem expedient. It shall be the duty of the city engineer to make all surveys, plans, specifications, maps, and estimates for all public works in the city or on property belonging to the city, and to perform such other duties as may be required of him by the executive board, other boards, commissions, or council or ordinances of said city.' * * That section 34 of said charter as revised by said council provides, *inter alia,* as follows: 'The specific powers granted to the city under sections 73 and 73½ of the charter of 1903 shall continue to be exercised by the council as a part of the general grant made by the charter'; and it is provided by section 73 of the said charter of 1903 of the city of Portland: 'The council has power and authority, subject to the provisions, limitations, and restrictions in this charter contained: (12) To provide for the opening, laying out, establishing, altering, extending, vacating and closing, or for establishing and changing the grades of streets, squares, parks, public places, and to provide for the improving and repairing of streets, squares, parks, and public places or of any land over which any right of way has been obtained, or granted, for any purpose of public travel by means of any kind of work, improvement, or repair mentioned in this charter, subject to the provisions and limitations contained in this charter, and in the constitution of the state of Oregon'; and it is further provided by said section 73 of the charter of 1903 of said city of Portland that the said council has power and authority: '(60) Except as otherwise provided in this charter or in the constitution or laws of the state of Oregon to regulate and control for any and every purpose the use of the streets, highways, alleys, sidewalks, public thoroughfares, public places and parks of the city;

to regulate the use of streets, roads, highways, and public places for foot passengers, animals, bicycles, automobiles, and vehicles of all descriptions; (61) to regulate, restrain, and prevent obstructions within the public streets, sidewalks, and places and to make all needful regulations to keep and maintain the public streets, sidewalks and places in a clean, open, and safe condition for public use; to provide for the removal, impounding, and sale or other disposition of such obstructions upon five days' notice'; and it is further provided by section 36 of said charter as revised by said council that: 'The foregoing or other enumeration of particular powers granted to the council in this charter shall not be construed to impair any general grant of power herein contained nor to limit any such general grant to powers of the same class or classes as those enumerated.' * * That section 188 of said charter as revised aforesaid provides, *inter alia,* that: 'The council by ordinance shall estimate and declare the necessary amount of money to be raised by the general taxes and shall levy the necessary taxes therefor. * * The said tax shall be collected by the officer collecting the county tax and shall be turned over by him to the city treasurer within ten days after he has collected the same with a statement of the amount of money so collected and the year or years for which the amount was collected; * * ' and section 190 of said charter as revised aforesaid provides that: 'The council on or before the 31st day of December in each year shall levy upon all property not exempt from taxation taxes to provide for the payment of expenses of the city for the ensuing year; * * ' and section 34 of said charter provides, *inter alia,* that council shall have power and authority: 'To appropriate money to pay the debts, liabilities, and expenditures of the city or any part or item thereof.' ''

It is further alleged that East Salmon Street in said city is a public street thereof and under the control and supervision of the defendants; that before the injuries complained of the defendant city had caused

said street to be improved and a wooden crosswalk to be constructed and opened for public travel across the street at the intersection of East Thirty-second Street with East Salmon Street:

"That for a long time prior to and at the time of plaintiff receiving the injuries hereinafter alleged and complained of, said crosswalk was carelessly and negligently permitted and allowed by the defendants, and each of them, to be, become, and remain in a badly defective, unfit, and dangerous condition in that a rotten, defective, splintered, and loosened plank was permitted and allowed to remain and be used as a part of said crosswalk so as to render said crosswalk unfit and unsafe for use by the public, and said defective, unfit, and dangerous condition of said crosswalk became and was at all times herein mentioned a matter of general and public concern; that at all times herein mentioned said defendants, and each of them, carelessly and negligently failed and omitted to repair and reconstruct and cause to be repaired and reconstructed said crosswalk at this point where said plank was and remained, and failed and neglected to remedy the said defective, unsafe, and dangerous condition thereof so as to render said crosswalk safe for public use and travel of the public thereon and thereover, and said defendants, and each of them, at all times herein alleged carelessly and negligently failed and omitted to erect, and cause to be erected, barriers, warnings, and other safeguards at and near and upon said crosswalk so as to protect the traveling public from said unfit, dangerous, and defective condition thereof; and said defendants, and each of them, at all times herein alleged, carelessly and negligently failed and omitted to post a notice or warning and to otherwise notify or inform the public of the unfit, unsafe, and condition of said crosswalk."

That about May 6, 1915, plaintiff, while crossing said walk and proceeding with due care for her own safety and being wholly unaware of the unfit and

dangerous condition of the walk and of said loosened, splintered, and defective plank, caught her left foot therein and was thrown down, thereby sustaining serious and permanent injuries, which are set forth in detail and abundantly supported by the evidence; that the dangerous and unfit condition of said walk was well known to said defendants, and to each of them, or by the exercise of ordinary care and diligence on their part, and on the part of each of them, they could and should have known of it; that said crosswalk was in a common and public thoroughfare and used as such by the citizens of said city and others; that the duty of said defendants and of each of them as to said crosswalk was and became at all times mentioned in this complaint a matter of public and general concern; that at all the times mentioned in the complaint the city engineer failed and neglected to suggest or recommend to said city council any ways or means for the proper repairing or reconstruction of said walk in a fit, proper, and safe manner as provided by the charter of the city and the laws of the state, and in violation of the duties imposed upon him. In addition to general damages plaintiff claimed special damages for medical attendance and nursing.

The City of Portland, the mayor and commissioners, and the defendant Dater filed separate general demurrers, which being overruled the City of Portland answered with what is practically a general denial of the material allegations of the complaint and pleaded the following affirmative defense:

"That section 281 of the charter of the city of Portland as revised, codified, and arranged by the council of said city August 19, 1914, is as follows: 'No recourse shall be had against the city for damage or loss to person or property suffered or sustained by reason of the defective condition of any sidewalk,

street, avenue, lane, alley, court, or place, or by reason of the defective condition of any sewer, or by reason of any defective drainage, whether any of said defects originally existed, or whether they were occasioned by construction, excavation, or embankment; nor shall there be any recourse against the city for want of repair of any sidewalk, street, avenue, lane, alley, court, or place, or by want of repair of any sewer; nor shall there be any recourse against the city for damage to person or property suffered or sustained by reason of accident on sidewalk, street, avenue, lane, alley, court, or place, or by falling from any embankment thereon or into any excavation therein; but in such case the person or persons on whom the law may have imposed the obligation to repair such defect in the sidewalk, street, or public highway, or in the sewer, and also the officer or officers through whose official negligence such defect remains unrepaired shall be jointly and severally liable to the party injured for the damage sustained.' "

The other defendants answered by a general denial and by an allegation of contributory negligence on the part of plaintiff.

The plaintiff filed a reply putting the new matters alleged in the answer in issue, and the case was tried before a jury on the 12th day of December, 1916. The testimony introduced by plaintiff tended to show that plaintiff was ignorant of the defect in the walk, and that while her residence was near the scene of the accident she was not accustomed to cross the street by way of the crosswalk placed where the accident occurred; that she was proceeding in the usual manner to cross the street and was pushing a baby-buggy in which was an infant ahead of her when her foot caught in the splintered portion of the walk, by reason of which she was thrown down sustaining very serious personal injuries. Other witnesses testified that many people traveled the street each day; that

the defect was open, patent, and visible, and had so existed for a period of from three weeks to three months there being considerable difference in their testimony as to the length of time; that the condition of the crossing had frequently been discussed in the neighborhood. P. F. Hailey, a witness for plaintiff, testified that for some time previous to the accident he was an employee of the City of Portland in the capacity of a street and sidewalk inspector; that he had noticed the bad condition of the crosswalk, which had continued for from three to six weeks previous to the accident; that he resided within about 35 feet of the crosswalk, and while he would not say positively that he had reported it he may have mentioned it to Mr. Wheeler, the district inspector, who was witness' immediate superior. Wheeler testified that no such report was made to him. There was no evidence tending to show that either Albee, the mayor, Brewster, Bigelow, Daly, or Dieck, the commissioners, or Dater, the city engineer, ever had any actual notice or knowledge of the condition of the walk, and each testified that he had no such notice or knowledge; the sole contention upon the trial being that by reason of its notoriety they should have known it if they had exercised that reasonable diligence required of them as officers of the city. There was a verdict and judgment against them for $6,350.20, from which they appeal.

REVERSED AND REMANDED.

For appellants there was a brief with oral arguments by *Mr. Walter P. LaRoche,* City Attorney, and *Mr. Henry A. Davie,* Deputy City Attorney.

For respondent there was a brief with oral arguments by *Mr. Harold V. Newlin* and *Messrs. Cleeton & McMenamin.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1. This case involves an examination of the whole law respecting the liability of city officers for injuries arising from the defective condition of streets as well as a consideration of the responsibilities imposed upon the particular officers here impleaded by virtue of the provisions of the city charter. Before considering these we will pass upon a preliminary question raised by plaintiff regarding the sufficiency of the appeal. As before stated, the City of Portland at the conclusion of plaintiff's testimony moved for a nonsuit, which was granted although no formal judgment of nonsuit appears to have been entered. Thereafter it disappeared from the case. No appeal was taken by plaintiff from the allowance of the motion, and it may well be questioned whether any appeal therefrom could have been taken until the entry of a formal judgment of nonsuit. However, that question is not before us. The notice of appeal by these defendants was not served upon the city, and it is claimed by plaintiff that the city is an "adverse party" within the meaning of Section 550, L. O. L., which requires that the notice of appeal shall be served upon "such adverse party or parties as have appeared in the action or suit, or upon his or their attorney." "An adverse party is a party whose interest in the judgment appealed from is in conflict with the modification or reversal sought by appellant": *Smith* v. *Burns,* 71 Or. 133 (135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666, L. R. A. 1915A, 1130). In *Lane* v. *Wentworth,* 69 Or. 242 (133 Pac. 348, 138 Pac. 468), Mr. Justice BURNETT, observes:

"It has constantly been determined by this court that, although parties are both plaintiffs or both defendants, yet if an appeal would unfavorably affect

the rights of one of them, as determined by the decree appealed from, he is an adverse party as respects his coplaintiff or codefendant, and that the jurisdiction of this court depends upon service of the notice upon all such parties: *The Victorian*, 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838); *Moody* v. *Miller*, 24 Or. 179 (33 Pac. 402); *Osborn* v. *Logus*, 28 Or. 302 (37 Pac. 456, 38 Pac. 190, 42 Pac. 997); *Stuller* v. *Baker County*, 30 Or. 294 (47 Pac. 705); *Conrad* v. *Pacific Packing Co.*, 34 Or. 341, 343 (49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021); *Cooper Mfg. Co.* v. *Delahunt*, 36 Or. 403, 404 (51 Pac. 649, 60 Pac. 1); *Hafer* v. *Medford etc. R. R. Co.*, 60 Or. 354, 356 (117 Pac. 1122, 119 Pac. 337)."

We can conceive of no way in which the interests of the City of Portland can be injuriously affected by this appeal. If the judgment of the Circuit Court should be reversed, that would not reinstate the City of Portland as a party defendant. If it should be affirmed, the plaintiff, would still be at liberty to begin another action—in fact, could have begun one at any time after the entry of judgment of nonsuit, and in case of a recovery have issued execution upon either judgment. Neither defendant could have called upon the other for contribution in any event as both were joint tort-feasors, if tort-feasors at all. So that in any view of the case we cannot say that as a *matter of law* the City of Portland would be injuriously affected by reason of any action we might take with reference to matters involved in the appeal.

2–6. We will now consider the case upon the merits. Among other provisions of the city charter we find the following:

"The city council shall have power and authority to regulate, restrain, and prevent obstructions within the public streets, sidewalks, and places, and to make all needful regulations to keep and maintain the pub-

lic streets, sidewalks, and places in a clean, open, and safe condition for public use," etc.: Subdivision 61 of Section 73, Portland Charter.

By subdivision 12 of said section the council is given power and authority "to provide * * for the improving and repairing of streets," etc. Other sections heretofore quoted in effect vest in the council all powers granted to the City of Portland by the charter. It is earnestly contended that the above provisions are purely legislative and impose no duty upon the council to repair the streets or any ministerial duties whatever. We do not so view the law. The power to control the streets of the City of Portland is one necessarily granted to it by its charter. The instrument by which it exercises that power is the city council. In *Rankin* v. *Buckman,* 9 Or. 253, this court, speaking through LORD, C. J., had occasion to construe certain sections of the charter of the City of East Portland which were practically identical with those here under discussion, and upon a complaint similar in terms to the one in the case at bar. That case disposes of many of the contentions made by defendants here. Mr. Chief Justice LORD, said:

"Having, then, the exclusive care and control of the streets and the means provided to repair them when defective, the duty which the law imposes upon the defendants is imperative to see that the streets are kept in a safe condition for the passage of persons and property, and if this plain duty is neglected and any one is injured, they are liable for the damage sustained."

This language must be taken with the qualification that neither the city nor its officers are insurers of the safety of the streets and of the persons using them, but it may be said that there rests upon the council an absolute duty to exercise reasonable diligence to

ascertain and keep itself informed as to the condition of its streets and to cause them to be repaired when defective. While such duties may in some instances involve the passage of ordinances or resolutions, they partake more of a ministerial than a legislative character, and in case of matters provided for by ordinance the duty does not end with the passage of an ordinance requiring certain officers to examine into and report the condition of the streets. There must be some diligence on the part of the council to ascertain whether such officers are performing the duties assigned to them, and what is reasonable diligence under the circumstances must depend upon a variety of conditions. Nobody could expect the councilmen of the City of Portland, with its twelve hundred miles of streets, to inform themselves personally as to the condition of the cross-walks in every part of the city, or, indeed, in any part of the city, unless such condition were so notoriously dangerous that it had become a matter of general public concern and discussion. The duty of a councilman in that respect, in the absence of any actual knowledge of a defect, is performed when he has used his best efforts to provide means to keep streets in repair and to have a sufficient force of employees to report defects as they occur, and other employees or subordinates to make the repairs. We do not propose to enter into any extended discussion of the law in such cases. The liability of each officer is a personal liability depending upon the diligence which he himself exercises as a guardian of the public weal to see that the streets are kept reasonably safe. It is in evidence here that the council had provided ample funds from which repairs might be made, that every policeman, and there are several hundred in the City of Portland, was in-

structed to report all defects in streets and walks, and that it had a city engineer and a corps of street inspectors whose duty it was to make such reports. There is no charge that the defendants were negligent in not providing funds or in failing to provide material, or guilty of negligence in the selection of employees or of lack of diligence in requiring reports as to the condition of the streets. None of these conditions are shown, but, on the contrary, it affirmatively appears that reasonable diligence has been exercised in all these respects. Counsel rest their whole case upon the circumstances that the defect had existed for so long a period and was so notorious the councilmen ought to have known of it. It is the universal rule that a public officer is not personally liable for the negligence of an inferior officer unless he, having the power of selection, has failed to use ordinary care in the selection: Story on Agency (9 ed.), § 321; *Bowden* v. *Derby,* 97 Me. 536 (55 Atl. 417, 94 Am. St. Rep. 516, 63 L. R. A. 223); *Brown* v. *West,* 75 N. H. 463 (76 Atl. 169); *Moynihan* v. *Todd,* 188 Mass. 301 (74 N. E. 367, 108 Am. St. Rep. 473); *Bailey* v. *Mayor,* 3 Hill (N. Y.), 531 (38 Am. Dec. 669); *Walsh* v. *Trustees, etc.,* 96 N. Y. 427; *Bowden* v. *Derby,* 99 Me. 208 (58 Atl. 993).

7–10. It is conceived that Section 281 of the charter of the City of Portland, which attempts to exempt the city from liability for injuries arising from defective streets and to place that liability upon the officer by reason of whose negligence the injury occurred does not create any new or additional obligation as against such officer, as a city official who personally neglects to perform a specific duty was always liable irrespective of any statute prescribing such liability: *Pullen* v. *Eugene,* 77 Or. 320 (146 Pac. 822, 147 Pac. 768, 1191, 151 Pac. 474). It is contended

by plaintiff's counsel with much plausibility that this line of reasoning leaves plaintiff practically without a remedy, and were we to adopt the theory of defendant's counsel such would be the result, but we cannot adopt that theory which in effect is that the city is not liable because of the exemption in the charter; that the commissioners are not liable because they have provided funds and used diligence in providing for inspection and had no notice of the defect; that the city engineer is not liable because he had under him inspectors charged with the duties of examination and inspection under orders to report any defect in the walk, and that these inspectors failed to report. This would leave the responsibility for the injury to rest finally upon the shoulders of some probably irresponsible watchman or inspector and would be practically a denial of a remedy. This under the peculiar provisions of the charter presents a view of the case not considered in any previous case brought before this court. Irrespective of the exemption clause in the charter the City of Portland would have been liable for the failure of Hailey, the street inspector, to report the defect upon the principle of *respondeat superior*. The city is out of the case as it stands here, neither party having appealed as to it, but it may well be doubted whether it is competent for the charter-making power to take away from plaintiff a complete remedy against the city, which is always solvent and responsible, and whittle down to the point where plaintiff will have a partial and doubtful remedy against the city officers or against a subordinate officer whose position is, perhaps, a little lower than a deputy inspector and a little higher than that of the dog-catcher. To the writer it seems that such a conclusion is contrary to justice and in

direct opposition to the doctrine laid down in *Batdorff* v. *Oregon City,* 53 Or. 402 (100 Pac. 937, 18 Ann. Cas. 287).

This case was begun upon the theory that both the city and the mayor and commissioners who constitute the council were liable, the city for the failure of its officers and employees to use reasonable diligence to ascertain and remedy defects in the walks, and the commissioners and city engineer for like negligence on their part; but in our view while they might have been properly so joined the facts which would have justified a recovery against the city might not justify a recovery against the councilmen or the city engineer. The city under the doctrine of *respondeat superior* would be liable for the negligence of any officer authorized by it to see to the repair of the street or perhaps for a failure to designate such officer. The mayor and commissioners, on the other hand, as heretofore observed, are not liable if they have used reasonable diligence to provide funds for such repair and to see that a system of inspection and report of disrepair of walks is provided for and competent persons designated to make such inspections and repairs, unless the defect is so glaring and notorious and long-continued as of itself to create a presumption of knowledge of its existence, which is not the case here. When the court, as the writer thinks, erroneously held that the city should be granted a nonsuit, it left counsel for the plaintiff in the embarrassing position of being compelled to contend that, to use their own language, "the city commissioners and engineer, the city commissioners particularly, are the body in whom all this power rests and upon whom all these duties are imposed, and consequently they are liable to the same extent and in the same manner as the city itself would

have been liable without the exempting provision in its charter."

Assuming the premise to be correct the reasoning of the counsel would seem to be logical. If the exempting provision is broad enough to make the members of the council and the city engineer liable for the neglect of subordinates in any event and irrespective of any diligence or lack thereof in their selection or supervision, then their counsel's contention is correct and the ruling of the court upon the motion for nonsuit was proper. But we apprehend that the negligence for which an officer of the city is responsible is his own personal negligence. In the very nature of things this must be so. An illustration will show the injustice of any other contention: Suppose, for instance, that the engineer had reported this defect to the council and, in the absence of funds, had requested that funds be voted for the purpose of making repairs, and that Albee and Brewster had voted to provide such funds and Bigelow, Dieck, and Daly had voted against the proposition, thereby defeating it, would it be contended for a moment that Albee and Brewster would be liable in damages for this injury which they had vainly attempted to prevent? Or suppose that two of the councilmen having obtained personal knowledge of the defect had failed to report it to their associates, would the negligence of these two be justly imputable to the other members of the body? The conclusion is irresistible that while before the attempted exemption of the city the negligence of its officers, either the council or subordinate officers, was imputable to it, such liability was not transferred to the shoulders of any city officer not actually or constructively negligent. The authorities cited by appellants amply sustain this view. The duty of making a

personal inspection of the walks of the city or of personally repairing them is not imposed upon the mayor, commissioners, or the city engineer, but it is the duty of the commissioners to provide for such repairs and to make such regulations as are necessary to keep the streets in a safe condition. In other words, their responsibility ends with using reasonable diligence to provide funds, competent inspection, and report as to the condition of the streets and walks, and in the absence of actual personal knowledge or such public notoriety in respect to a defect as would indicate that they ought to have known of it by the exercise of reasonable diligence, they are not liable. There is no such notoriety shown here. Portland contains approximately a quarter of a million of inhabitants. It appears from the testimony that something less than a dozen people had noticed the defect, and that three or four of that number had casually mentioned it to neighbors, but nobody seemed to consider the matter serious enough to report to the authorities. The existence of the defect seems not to have been known to anybody except these few persons living in the immediate neighborhood and was not a matter of general public notoriety or concern. The plaintiff who resided within a block of the crossing testifies that she was entirely ignorant of the defect, and yet it is contended the mayor and commissioners with all the multitudinous duties devolving upon them should be adjudged to have been negligent and to pay the plaintiff $6,350 because they did not know of the existence of this defect and repair it. Under the circumstances here the existence of the defect in the walk for three weeks, or perhaps double that time, is no evidence of notice to the council or of lack of diligence on their part in the discharge of their duties. If one

of the principal bridges in the town should become in such a state of disrepair as to be a public menace or impede the public travel, it naturally would become a source of public concern to many people, and the commissioners would in the ordinary course of affairs hear of it. If they were charged with the duty of making a personal inspection of the walks of the city and failed to find a defect which was open and apparent, there might be some reason for the inference that a defect which had existed for several weeks should have been discovered and repaired, but in the very nature of things they can act only through subordinate officers, and it is not claimed that any policeman or inspector ever made any report, and it is evident that no member of the council ever had any personal knowledge of the defect. There was no evidence to justify a finding that the mayor and commissioners were guilty of negligence.

11. As to the city engineer it may be said that it was his duty to use reasonable diligence to ascertain the condition of the streets and walks of the city, and in case defects were found to exist to promptly inform the council or take such measures as are necessary to have the defects remedied. While these duties are personal to him to a limited extent, it follows from the very nature of the case that in a city the size of Portland the inspection cannot be performed by him personally, and it appears from the evidence that to a great extent such inspection must be made by persons not selected by him or under his control, but serving under civil service rules and appointed by another authority. In estimating, therefore, the diligence exercised by him personally it was proper to show the mileage of streets in the city and the efforts made by him personally to secure a proper and complete in-

spection and repair. In attempting to show this and in enumerating the duties imposed upon him Mr. Dater, the engineer, testified as follows:

"A supervision of all construction work in the nature of bridges, streets, and sewers, which work includes an average of a million dollars a year. The supervision of certain sewers and street repair work on funds voted by the council specifically for that work, and during the year 1915 there was upon street repair work three crews mainly employed on repair of macadam streets. I think at the particular time of this accident, or just prior to it, two of those crews were at work in the so-called Northeast district, which included the place of accident. One of those crews had been over this particular district shortly before the accident, and in connection with their duties of repairing the streets, and macadamizing the street, they did repair all cross-walks, gutters, and other parts of the street, which appeared to need attention. There are over 1200 miles of street in the city, and to give personal attention to it would require five and six years of walking to get over it."

Plaintiff's counsel moved to strike out such testimony as not being responsive to the question nor within the ruling of the court, and being a conclusion of the witness, which motion was allowed and the testimony stricken out. This was material error. The witness was entitled, in order to relieve himself of the charge of lack of due diligence in ascertaining defects in the street, to show, first, the nature of the task, and, second, the efforts he made to perform it. The law never requires impossibilities, and all it demands of any official is that he shall honestly and faithfully do his best under the particular circumstances. Having done this he is blameless. The witness testified along the same line as follows:

"To show the efforts which were made to obtain information and keep track of such matters, I would

say that all employees in the department were under written orders to report any defects in street surface, or any public property that they saw, or which is reported to them. I have to depend almost wholly upon these reports and on the reports from the police department. I presume reports from the police department are the most important, because that organization covers the entire city every day presumably. There is a record kept in the office of all complaints made by individuals, often complaints come in over the telephone. All complaints filed by the Police Bureau, those complaints are each given an individual number and they are reported at once to the officer or employee who should attend to them. There is every effort possible made to follow them up promptly. And dangerous cases—"

This was also stricken out. He further stated:

"The orders are that all important cases, all dangerous cases, should receive immediate attention. In the matter of sidewalks, in this particular year, there were posted over twenty-seven miles of sidewalks for reconstruction."

For the reason given above this testimony should have been allowed to go to the jury.

The judgment of the Circuit Court is reversed and a new trial awarded. REVERSED AND REMANDED.

MR. JUSTICE MCCAMANT absent.

MR. JUSTICE MOORE delivered the following dissenting opinion:

I cannot concur in the conclusion reached in this case by the Chief Justice. A contrary rule was established in the case of *O'Harra* v. *City of Portland,* 3 Or. 525, where it was held that a section of the charter of the City of Portland exempting that municipality from liability for any personal injury arising from a defec-

tive street was operative. That determination has prevailed in this state nearly forty-eight years and should, in my opinion, be controlling. In *Mattson* v. *Astoria,* 39 Or. 577, 579 (65 Pac. 1066, 87 Am. St. Rep. 687), Mr. Chief Justice BEAN, citing the decision rendered in the preceding case, says:

"That it is within the power of a legislature to exempt a city from liability to persons receiving injuries on account of streets being defective or out of repair, is unquestioned. * * But in such case the injured party is not wholly without remedy. He may proceed personally against the officers to whom the charter delegates the duty of keeping the streets in repair, and from whose negligence the injury resulted."

The legal principle last announced is subject to the qualification that before municipal officers who are charged with the performance of the duty can be rendered liable for damages resulting from a personal injury caused by a defective street they must have had at their command the means with which to renew the highway: *Batdorff* v. *Oregon City,* 53 Or. 402 (100 Pac. 937, 18 Ann. Cas. 287). The defendants, who are officers of the City of Portland in this instance, had at their disposal ample funds with which to make the needed repairs; and as they were elected with notice of these decisions they ought, in justice to be bound by them.

Rehearing denied September 11, 1917.

PETITION FOR REHEARING.

(166 Pac. 537.)

On petition for rehearing. Rehearing denied.

Mr. Harold V. Newlin and *Messrs. Cleeton & McMenamin,* for the petition.

Mr. Walter P. LaRoche, City Attorney, and *Mr. Henry A. Davie,* Deputy City Attorney, *contra.*

In Banc. MR. JUSTICE HARRIS delivered the opinion of the court.

The plaintiff has filed two petitions for a rehearing, one for a rehearing of the motion to dismiss the appeal, and the other for a rehearing "upon the merits." The original presentation of the motion to dismiss the appeal was supported by three carefully prepared briefs in which counsel for plaintiff exhaustively argued their contention. While the petition for a rehearing contains no argument not previously advanced by the plaintiff we have nevertheless re-examined the motion to dismiss the appeal with the result that the re-examination carries us along the same path of reasoning which Mr. Chief Justice MCBRIDE followed in the original opinion and brings us to the same conclusion which he there expressed: *Colby* v. *Portland, ante,* p. 359 (166 Pac. 537).

The petition for a rehearing "upon the merits" does not require an extended discussion and it is sufficient to say that after considering the suggestions of counsel our conclusion is that a rehearing should be denied; and it is so ordered. REHEARING DENIED.

MR. JUSTICE MCCAMANT took no part in the consideration of this case.

Argued July 19, reversed and remanded July 31, rehearing denied September 11, 1917.

HICKEY v. COFFEY, COUNTY CLERK.

(166 Pac. 959.)

Pleading—Code—General Denial—Scope.

1. Amendment to Section 73, L. O. L. only permits a general denial, at election of defendant, to take place of former specific contradiction of material allegations of plaintiff's primary pleading, but does not enlarge original scope of the answer.

Arrest—Property in Possession of Prisoner—Right of Possession.

2. Clerk of court cannot, under Sections 1705–1713, L. O. L., providing for custody and disposal of stolen or embezzled property, retain possession of bank note, taken from person convicted of obtaining money on fraudulent checks, but his property, as against plaintiff claiming as convict's assignee, where it was deposited with clerk for use as evidence on criminal trial, and clerk holds it for defrauded merchants, but only if he connects himself with proceeding by such merchants whereby custody of note is secured by officer under legal writ.

[As to replevin against public officers, see note in 25 **Am. St. Rep.** 256.]

Replevin—General Denial.

3. In an action to recover bank note which plaintiff claimed was assigned to him by one accused of obtaining money by false pretenses, where only defenses pleaded were general denial and that money belonged to persons whom accused had defrauded, and undisputed evidence shows it belongs to accused, court erred in submitting to jury and admitting evidence on question whether assignment was made in good faith, since under a general denial only evidence tending directly to disprove plaintiff's title or right of possession is admissible, and defense that assignment was made in bad faith, and plaintiff's title therefore voidable, must be specifically pleaded.

From Multnomah: ROBERT G. MORROW, Judge.

Action in replevin by Oliver M. Hickey against John B. Coffey, as county clerk of Multnomah County, Oregon. From a judgment rendered upon a verdict in favor of defendant, plaintiff appeals. Reversed and remanded with directions.

Department 2. Statement by MR. JUSTICE MOORE.

This action of claim and delivery was commenced in the District Court of Portland, Oregon. The com-

plaint alleges: (1) That the defendant John B. Coffey at all the times mentioned was and is the county clerk of Multnomah County, Oregon; (2) that about June 1, 1914, and for a long time prior thereto, the plaintiff, Oliver M. Hickey, was, ever since has been, and is the owner and entitled to the immediate possession of one United States bank note for $100, one gold certificate for $20, giving the serial number of each, and two United States gold coins of $5 each, stamped, respectively, in the years 1905 and 1906, of the aggregate value of $130; (3) that on April 9, 1915, and prior to the commencement of this action, the plaintiff demanded possession of such property from the defendant, who then refused to comply therewith, and ever since that time he unlawfully holds in that county all such property from the plaintiff, to his damage in the sum of $130.

The answer admits paragraph 1 of the complaint, denies generally paragraph 2 thereof, admits that the possession of such property was demanded and delivery thereof refused, but denies generally all other averments of paragraph 3 of the initiatory pleading. For a further defense it is alleged that the demanded property was taken from the possession of Paul Williams, *alias* Earl Carl, *alias* John R. Ainsley, upon his lawful arrest for the crime of obtaining money and property by false pretenses; that the money so secured was turned over to the defendant as county clerk to be held as evidence in an action pending in the Circuit Court of that county upon an indictment charging Williams, *alias* Carl, *alias* Ainsley, with the commission of that offense; that a plea of guilty as charged was interposed to the indictment and the defendant in that case, whose name is Paul Williams, was sentenced to imprisonment in the state penitentiary; that such per-

sonal property does not belong to Williams, but was obtained by him by means of fraudulent checks from various merchants in Portland, Oregon, for the crime against one of whom Williams was convicted and sentenced to imprisonment as stated; that such sum of money is being held for distribution among the lawful owners thereof, as may appear from proof to be submitted by them; and that neither Williams nor the plaintiff herein has any lawful title, ownership or right of possession in or to said personal property.

A reply put in issue the allegations of new matter in the answer, and the cause being tried resulted in a judgment for the defendant, from which the plaintiff appealed to the Circuit Court of that county, where the action was retried eventuating in a like judgment, from which the plaintiff appeals to this court.

REVERSED AND REMANDED.

For appellant there was a brief over the names of *Mr. Frank E. Swope* and *Mr. Oliver M. Hickey,* with an oral argument by *Mr. Swope.*

For respondent there was a brief over the names of *Mr. Philip F. A. Boche, Messrs. Joseph & Haney* and *Mr. B. H. Goldstein,* with an oral argument by *Mr. Boche.*

MR. JUSTICE MOORE delivered the opinion of the court.

The evidence shows that on March 24, 1914, an indictment was returned in Multnomah County, Oregon, against Earl Carl, *alias* John R. Ainsley, charging him with the crime of obtaining by false pretenses from the Meier & Frank Company, a corporation, money and property of the value of $25.50. The person so charged and his wife were arrested at Los Angeles,

California, by an officer, who took from them the money described in the complaint and brought them to Portland, Oregon, where they were placed in jail, and the money was deposited with the defendant as county clerk. The plaintiff is an attorney to whom was executed a writing which reads:

"April 24, 1914.

"I, the undersigned, for and in consideration of services performed and to be performed by Oliver M. Hickey, for me and my wife, hereby assign, transfer and set over to said Oliver M. Hickey all my right, title and interest in and to the $130 now held by the clerk of the circuit court of the State of Oregon, as evidence in the case of the *State of Oregon* v. *Earl Carl,* whose true name is Paul Williams. I further certify that said money is my own money.

"(Signed) PAUL A. WILLIAMS,
"Detained as Earl Carl."

The plaintiff testified that he made a contract with Williams whereby the latter agreed to pay him for the services so to be rendered $200, but that only $66.25 had been received on account thereof. Copies of orders made by the trial court in the case of State of Oregon against Paul Williams were received in evidence showing the return to several merchants in Portland, Oregon, of various articles of wearing apparel which Williams had unlawfully obtained from them, and that by false pretenses he had also secured from merchants in that city, naming them, sums of money amounting to $231.49, on account of which no payment was made.

Williams was taken from the state penitentiary, where he was serving a term upon a conviction under the indictment mentioned in order that he might appear as a witness for the defendant at the trial of this cause, and referring to the $100 bill described in

the complaint he stated upon oath that he obtained it from a station agent in the depot at Seattle, Washington, by exchanging other money for it. This statement is not contradicted in any manner. On direct examination the following question was propounded:

"I will ask you point blank if the $130 was your money? You certified in there [the assignment] either at your own suggestion or at Hickey's suggestion that, 'I further certify that the said $130 is my own money.' Now, you told us why you put that in. In fact, was that certificate true? Was that statement true?"

The plaintiff's counsel then said:

"I object to that, if the court please, because the pleadings show that it was his own money."

The defendant's counsel continued:

"I will say to you here your statement does not necessarily—I don't want you to state anything that will further incriminate you, but you can state truthfully merely so the jury can know what was in your mind at the time you made the assignment."

The plaintiff's counsel then remarked:

"I object to that question on the ground it is incompetent, irrelevant, and immaterial, for the reason that the issues made by the pleadings show that the legal title to the money was in Mr. Williams."

The objection was overruled, and an exception allowed. Thereupon the defendant's counsel further inquired:

"What do you say to that?"

The witness answered:

"I considered it my money at that time."

Williams was further questioned by defendant's counsel as follows:

"Paul, what was the purpose of writing this order of assignment to Hickey?"

He replied:

"The purpose was to secure the $130.

"Q. For whom?

"A. My own personal expenses. I had no money.

"Q. Exactly. Now, did you have any agreement with Hickey to pay $200 attorney's fees?

"A. Well, I don't exactly remember what kind of an agreement we may have had about what he was to receive as his fees.

"Q. Do you remember whether you had any definite agreement as to his fees?

"A. Yes, there was some agreement, and that assignment covered a part of it.

"Q. What was the agreement?

"A. I gave him to understand my mother and probably some of my wife's relatives would pay him. * *

"Q. What then do you say was the purpose of giving Hickey this assignment?

"A. To obtain the money from Andrew Vaughn principally.

"Q. That is the idea. What other reason did you have?

"A. I needed money. I had no money. I needed it for expenses, as I said before, and I realized I would have to pay attorney's fees. I thought I would probably need some money as expenses while I was laying in jail, and I didn't like to see Andrew Vaughn keep the money.

"Q. Furthermore, where did you get your money for expenses while you were in the county jail?

"A. I got that from Mr. Hickey.

"Q. He would advance you small sums occasionally, would he, at your request?

"A. Mr. Hickey did advance me several sums.

"Q. After getting this so-called assignment?

"A. I don't know exactly when all the advances were made. They were while I was in jail.

"Q. The assignment was given almost immediately after you were brought here, was it not?

"A. I should say about 8 or 10 days afterwards.

"Q. Now, I will ask you once more what the fact was about having any agreement with Hickey about paying any fixed sum as an attorney's fee?

"A. Well, I really don't remember any fixed sum, but it was understood, of course, he was to be paid."

When all the testimony had been received and the cause submitted, the following solicitation was made:

"The plaintiff at this time requests the court to instruct the jury to bring in a verdict for plaintiff for the property described as the $100 bill, for the reason that the uncontradicted evidence shows that the plaintiff is entitled to it; second, for the further reason the defendant has not pleaded any special property in it, nor has he connected himself with the title to the property."

This motion was denied and an exception allowed.

An exception was also taken to a part of the court's charge to the jury, viz.:

"The plaintiff must satisfy you by weight of the evidence that the pieces of money described in the complaint were the property of Paul Williams at the time this assignment was made. He must also satisfy you by the weight of evidence that it was a genuine assignment, made in good faith, and intending to convey the title to him; that it must have gone to Mr. Hickey."

Here a juror inquired:

"For services?

"The Court: It must have been a genuine, real transfer of the money.

"A Juror: No matter what for?

"The Court: I don't care what it must have been for, but it must have been for Mr. Hickey, and not in trust, not to do something else with. It must have been a real transfer of the money, and Williams must have owned it. The presumption is when you find a man with some money that he owns it. Whether he

does in fact own it, that is a question of fact the jury will have to determine."

In *Coos Bay R. R. etc. Co.* v. *Siglin,* 26 Or. 387 (38 Pac. 192), which was an action of replevin wherein the answer failed to allege that the demanded property was transferred in order to hinder, delay or defraud creditors of an assignor, it was held that such defense was unavailing unless pleaded and that a part of the court's charge to the contrary was erroneous. In reversing the judgment in that case Mr. Justice WOLVERTON says:

"The instructions of the court below to which exceptions were taken would seem to indicate that evidence was given tending to show that R. A. Graham had sold or transferred the property in dispute to the plaintiff for the purpose of cheating, wronging, and defrauding his creditors, in which purpose plaintiff participated, or at least was chargeable with knowledge thereof. Under the allegations of the complaint plaintiff is required to show title in himself, or a present right of possession. Any evidence which would tend directly to disprove his title or right of possession would be pertinent under the specific denials of the answer; and the question recurs whether the evidence assumed by the instructions to have been given tends to this end. Such evidence may impeach or overthrow plaintiff's title, but it cannot be said that it disproves it. In fact, if it be conceded that the plaintiff purchased the property directly from Graham, the effect of such evidence would be to show that it had title, and one absolutely good as against Graham. When the statute says that a sale or transfer of property made for the purpose of hindering, delaying, or defrauding creditors is void as to them, such a sale or transfer is, in legal contemplation, only voidable, and that at the instance of a creditor. As between the parties, the sale or transfer may be absolute and unimpeachable. Unless a creditor moves, the title stands, and is good against all the world; so that

there is a distinction between showing a want of title, and in impeaching or overthrowing it. * * Another element concurs to make this new matter, and that is the alleged fraud committed as against creditors. Usually fraud cannot be proven unless alleged by the pleadings, as it is a general and well established rule that fraud will not be presumed. The object of our code pleading is to give notice to the opposite party of the defense intended to be interposed. This case is an illustration in point."

1. The plaintiff's counsel, invoking the legal principle thus announced, maintains that errors were committed in receiving the testimony so objected to, and in giving the instruction to which an exception was taken. It is insisted by defendant's counsel that since the decision thus referred to was rendered the statute has been amended authorizing a general denial to put in issue all the allegations of a complaint, and this being so the testimony objected to was admissible and the instruction predicated thereon, and which is complained of, was proper. After that case was decided the statute was amended by inserting the words included in brackets as follows:

"The answer of the defendant shall contain:

"1. A [general or] specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; [provided, however, that nothing can be proved under a general denial that could not be proved under a specific denial of the same allegation or allegations]. 2. A statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition": Section 73, B. & C. Compilation; Section 73, L O. L.

It will thus be seen that the amendment has not enlarged the original scope of the answer, and only permits a general denial, at the election of a defendant,

to take the place of the former specific contradiction of the material allegations of the plaintiff's primary pleading. The defendant's counsel cites and relies upon decisions from the Supreme Courts of several states, the substance of which is stated in *Gila Valley etc. R. Co.* v. *Gila County,* 8 Ariz. 292, 294 (71 Pac. 913, 914), as follows:

"Where the code system of pleading prevails, the rule is almost universal that a general denial in a replevin case puts in issue every fact stated in the complaint necessary to sustain the plaintiff's cause of action."

The decision in the case of *Coos Bay R. R. etc. Co.* v. *Siglin,* 26 Or. 387 (38 Pac. 192), determines the question here involved. Nor is the conclusion there reached without support as will be seen from the textbooks and cases cited at page 393 of the opinion. To the same effect see Cobbey, Replev. (2 ed.), § 781.

If the defendant herein had offered proof tending to show that the money so deposited with him was held by virtue of some legal writ caused to be issued by Williams' creditors, against whom the plaintiff obtained no valid title by reason of a voidable transfer of the money, there might have been some reason for holding the general issue sufficient to let in such evidence: *Bailey* v. *Swain,* 45 Ohio St. 657 (16 N. E. 370).

2. Sections 1707–1713, L. O. L., provide for the custody and disposal of stolen or embezzled property. So far as disclosed by the testimony herein the $100 bill, the right to the possession of which is controverted, does not come within the keeping or distribution of such money. The Portland merchants from whom Williams fraudulently obtained money and goods are not named, nor is the value of such merchandise or the sums of money so secured from each stated in the answer. The sufficiency of the answer

was not challenged by reason thereof, and the orders made by the Circuit Court in the case of state against Williams supply the necessary information in these particulars. Those merchants were entitled to be reimbursed from any of Williams' property that was subject to execution. So far as the $100 bill is concerned they were mere creditors whose rights could be asserted and established only by some legal writ issued in actions instituted for that purpose whereby the custody of that sum of money was secured by an officer who could justify his acts under the process. If any such proceedings were had, the defendant herein does not connect himself, either by averment or proof, with any such creditor, and for that reason he is not entitled to retain the possession of the $100 bill: Cobbey, Replev. (2 ed.), § 786; Wells, Replev. (2 ed.), § 695. Without deciding the question, it will be assumed that the remainder of the money was unlawfully obtained by Williams from the Portland merchants whom he was enabled to defraud, and that under Sections 1707–1713, L. O. L., the defendant or his successor in office holds and should have custody of the sum of $30 until it has legally been distributed.

3. Errors were committed in refusing to direct a verdict in plaintiff's favor for the $100 bill, in receiving, over objection and exception, the testimony mentioned, and in giving the instruction the sufficiency of which was challenged. The judgment is, therefore, reversed and the cause remanded with direction to render judgment for the plaintiff that he is the owner of and entitled to the immediate possession of the $100 bill.

REVERSED AND REMANDED.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued July 20, affirmed September 11, 1917.

KRUSE *v.* BUSH.

(167 Pac. 308.)

Vendor and Purchaser—Remedies of Purchaser—Fraud—Action to Recover Consideration.

1. One induced by fraudulent representations to purchase land under an executory contract upon discovering the fraud may rescind the contract absolutely, and sue in an action at law to recover the consideration paid.

[As to remedy of vendee in case of deficiency in quality or quantity, see note in Ann. Cas. 1915D, 1108.]

Vendor and Purchaser—Fraud—Recovery of Purchase Money.

2. In the absence of fraud or some other ground for rescission, the purchaser cannot escape his contract obligation or recover back the purchase money paid, though the rule is otherwise where the purchaser is entitled to rescind.

Vendor and Purchaser—Fraud—Rescission—Time.

3. Where a purchaser and his assignee might disaffirm an executory contract of sale for fraudulent representations, they were required to do so promptly on discovery of the fraud.

Vendor and Purchaser—Fraud—Action to Recover Consideration—Right of Assignee.

4. Where a purchaser under an executory contract elected to rescind on the discovery of the vendor's fraudulent representations and quitclaimed the property to defendant and demanded a repayment of the money paid on the contract, she became entitled to sue for money had and received, and such claim might be asserted by her assignee.

Vendor and Purchaser—Remedies of Purchaser—Action to Recover Consideration—Instruction.

5. In an action by a purchaser's assignee for money paid under an executory contract of sale rescinded on the ground of the vendor's fraudulent representations, an instruction that plaintiff need not prove all the alleged representations to be false, and that it was sufficient to prove that a single representation was false, that the fraud, as defined by the instruction, must be clear and convincing, was not objectionable as permitting the jury to find for plaintiff if the alleged representations were fraudulent in a single respect, even though the falsity was inconsequential.

Vendor and Purchaser—Remedies of Purchaser—Recovery of Consideration.

6. Plaintiff was not required to show a total failure of consideration.

From Multnomah: GEORGE N. DAVIS, Judge.

Action by M. Kruse against H. P. Bush and A. E. Borthwick for money had and received as payments on contracts for the purchase of real property. Plaintiff elects to rescind on the ground of fraudulent representations made by the agent of defendant Borthwick. A verdict was returned and judgment entered thereon in favor of plaintiff and defendants appeal. Affirmed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action for money had and received, brought by plaintiff in her own right and as assignee of Mrs. D. E. Tanna. The first count in the amended complaint alleges the execution of two contracts by plaintiff with the defendant Borthwick for the purchase of two tracts of land in Multnomah County and that the execution of these contracts by plaintiff was induced by fraudulent representations made by the defendant Bush, as agent of the defendant Borthwick; the falsity of the representations is averred and it is charged that on discovering the alleged fraud plaintiff notified defendants of her election to rescind, tendering a quitclaim deed to the property. This quitclaim was deposited in court on the bringing of the action. Plaintiff prays for judgment for the amounts which she has paid on account of the purchase price.

The second count is similar in purport. It alleges a contract entered into by D. E. Tanna with the defendant Borthwick for the purchase of a tract of land in the same neighborhood, induced by the same representations. It is alleged that Mrs. Tanna elected to rescind, quitclaimed the property to defendants and assigned her right of action to plaintiff.

The defendants demurred separately to the counts in the amended complaint; this demurrer was overruled and the defendants then answered. The answer admits the marketing of the property by the defendant Borthwick, the refusal of the defendants to treat the contracts as rescinded and to pay plaintiff the sums demanded; it also admits the assignment of Mrs. Tanna's claim to plaintiff. The other allegations of the amended complaint are denied.

A judgment was entered in favor of plaintiff on a verdict recovered by her, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Charles E. Lenon* and *Mr. Clinton A. Ambrose,* with an oral argument by *Mr. Lenon.*

For respondent there was a brief over the names of *Mr. Walter Hayes* and *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. Bardi G. Skulason.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. The defendants challenge the right of plaintiff to maintain her action for money had and received, claiming that rescission is an equitable remedy and that plaintiff has no remedy at law except an action for damages. This contention is reserved by the demurrer to the amended complaint and by motions for a nonsuit and for a directed verdict, exceptions being taken to the denial of these motions. It is said in 39 Cyc. 1253, with reference to contracts for the purchase of real estate, that:

"Fraud renders the contract voidable at the option of the injured party and entitles him to rescission of the same at law so long as it is executory."

The contracts with which we are concerned were executory; the quitclaims were required only because plaintiff and her assignor had recorded their contracts.

In 39 Cyc. 1997 it is said:

"One who has been induced by fraudulent representations to become the purchaser of property has, upon the discovery of the fraud, three remedies open to him, either of which he may elect: He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract; he may bring an action in equity to rescind the contract and in that action have full relief; lastly, he may retain what he has received and bring an action at law to recover the damages sustained."

Plaintiff in this case has elected to pursue the first of these remedies. Her right to do so is recognized by Warvelle on Vendors, § 918; *Mael* v. *Stutsman,* 60 Or. 66, 69 (117 Pac. 1093); *Koehler* v. *Dennison,* 72 Or. 362, 366 (143 Pac. 649); *T. B. Potter Realty Co.* v. *Breitling,* 79 Or. 293, 305 (155 Pac. 179).

2, 3. Defendants also claim that plaintiff has no remedy so long as she and her assignor have not paid all the purchase price called for by their contracts and the defendants are still willing to consummate the sales. None of the authorities cited by defendants on this branch of their contention were cases involving fraud. In the absence of fraud or some other ground for rescission, the vendee cannot escape the obligations he has assumed in the contract of purchase, nor can he recover back the purchase money which he has paid. But the rule is otherwise when the vendee is entitled to rescind: *Livesley* v. *Muckle,* 46 Or. 420, 423 (80 Pac. 901); *Jeffreys* v. *Weekly,* 81 Or. 140 (158 Pac. 522). If plaintiff and her assignor were to disaffirm the contracts, it was necessary for them to act promptly on discovery of the fraud. The continued payment of

the installments called for by the contracts would have been evidence of a ratification of the contracts and would probably have defeated the remedy here invoked: *T. B. Potter Realty Co.* v. *Breitling,* 79 Or. 293, 305 (155 Pac. 179).

4. Defendants challenge the right of plaintiff to sue on the second cause of action set up, on the ground that Mrs. Tanna's claim was not assignable. It is clearly alleged and proved that Mrs. Tanna elected to rescind on the discovery of the alleged fraud; that she quitclaimed the property to defendants and demanded the repayment to her of the sums paid the defendant Borthwick on the contract. The pleadings admit that she then assigned her cause of action to plaintiff. The claim was assignable within the principles announced by Mr. Justice MOORE in *Sperry* v. *Stennick,* 64 Or. 96 (129 Pac. 130). If after making discovery of the alleged fraud Mrs. Tanna had merely assigned her contract to plaintiff or if, without exercising her election to rescind, she had merely assigned her litigious right, the case would come within the rule laid down by Mr. Justice HARRIS in *Cooper* v. *Hillsboro Garden Tracts,* 78 Or. 74, 86–88 (152 Pac. 488). But here plaintiff's assignor exercised her right to rescind, demanded repayment of the money she had paid and put defendants in *statu quo* by quitclaiming the property to them. Having thus become entitled to sue for money had and received, she assigned her claim to plaintiff and plaintiff is entitled to assert it.

5. The court instructed the jury as follows:

"It is not necessary that the plaintiff should prove that all the representations she claims were made and were false. It is sufficient if she proves that a single one of such representations was made and that it was false and that the other elements which will be described to you, were present. However, because of

the seriousness of the charge of fraud, the law says that the proof of fraud must be clear and convincing, and you must so find in this case before you can say that there was fraud.

"Now, in order to constitute fraud there are certain elements which must be established by the plaintiff. You must find, first, that the defendants made the representations, or at least one of them. You must find further that the defendants made those representations for the purpose of circumventing or deceiving this plaintiff. You must further find that the representations were made for the purpose of inducing the plaintiff to act upon them and you must find that the plaintiff did rely and act upon them and was induced by them to enter into the transaction in this case. Then you must find as a further element that the further representations were false, if you find they were made, and you must find either that the defendants knew them to be false or else made them recklessly and with a disregard to the truth or falsity of them, and you must further find that the defendants made them for the purpose of inducing the plaintiff to act upon them as I said before. Now, if you find that there was fraud, as it has been defined to you by the court, then such fraud would justify the plaintiff in rescinding these contracts, plaintiff and her assignor in the second cause of action, and she would be entitled to recover the money which she had paid, or her assignor has paid on account of these contracts, with interest from the dates of payment."

Defendants complain that this charge permitted the jury to find for plaintiff if in a single respect the representations of defendants were false and fraudulent, even though the departure from the truth was inconsequential. The jury was not authorized under the above charge to find for plaintiff unless it found that the fraudulent representations were the inducing cause of the contracts. This portion of the charge covered the question of the materiality of the representations.

6. Plaintiff was not required to show a total failure of consideration. Her right of action was based on fraud and her testimony was sufficient to take the case to the jury.

We have patiently examined the authorities cited by counsel for defendants, but it is not considered necessary to review them in this opinion. The questions mooted are for the most part settled by the decisions of this court. We find no error and the judgment is affirmed.

In justice to the defendant Borthwick it should be said that the evidence fails to connect him personally with any of the representations leading up to the execution of these contracts. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Demurrer to alternative writ sustained September 11, 1917.

LEWIS *v.* VARNEY, CONSTABLE.

(167 Pac. 271.)

Statutes—Special or Local Legislation—Punishment of Crime.

1. General Laws of 1917, page 794, providing a license tax for dogs to be collected by the constables in the several counties declared to be subject to the law, etc., Section 10 providing that any person violating the act shall be deemed guilty of a misdemeanor, which excepts from its operation all of the territory east of the summit of the Cascade Mountains, and the counties of Josephine, Jackson, Coos, Curry, Lincoln, Tillamook, Clatsop and Columbia, is violative of Article IV, Section 23 of the Constitution, providing that the legislature shall not pass special or local laws for the punishment of misdemeanors.

Original proceedings in Supreme Court.

The plaintiff, Irwin W. Lewis, sought by *mandamus* to compel the defendant, Percy M. Varney, constable of Salem District, Marion County, Oregon, to enforce

an act passed by the twenty-ninth legislative assembly of Oregon, commonly known as the "dog license law" (Laws 1917, p. 794, c. 369), or show cause why he has not done so. The defendant demur to the alternative writ. Demurrer sustained.

Mr. Ernest R. Ringo, for the demurrer.

Mr. Everil M. Page and *Mr. Philip J. Kuntz, contra.*

In Banc. MR. JUSTICE BENSON delivered the opinion of the court.

An alternative writ of *mandamus* having issued out of this court, directing the defendant, a constable, to enforce the provisions of Chapter 369, General Laws of Oregon, 1917, or show cause why he has not so done, the defendant demurs to the writ, the sufficiency of which is the question here considered. The statute in relation to which this controversy arises, provides for a license tax for dogs, to be collected by the constables in the several counties which are declared to be subject to the law, and to be paid to the several county treasurers, and by them kept as the "dog fund," and to be used in payment of damages to those whose sheep, poultry, etc., have been injured by vagrant dogs. Section 10 of the act reads as follows:

"Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and subject to a fine not to exceed $50.00 or by imprisonment in the county jail not to exceed twenty-five days, or by both such fine and imprisonment."

Section 1 of the act excepts from its influence all of the territory east of the summit of the Cascade Mountains, and the counties of Josephine, Jackson, Coos, Curry, Lincoln, Tillamook, Clatsop and Columbia.

It will therefore be observed that the statute is to be enforced in a comparatively small portion of the state. It should also be noted that Section 10, quoted *supra,* makes the act a criminal statute. Article IV, Section 23, of the Constitution contains the following paragraphs:

"The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say—1. Regulating the jurisdiction and duties of Justices of the Peace and of Constables; 2. For the punishment of crimes and misdemeanors."

The act in question is a local law as defined in *Maxwell* v. *Tillamook County,* 20 Or. 495 (26 Pac. 803), in which Mr. Justice LORD, speaking for the court says:

"Hence, if the act in question is local or special,—obnoxious to either objection,—the legislature was without power to enact it, and the act is without any validity. A local act applies only to a limited part of the state; it touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens."

Further comment is unnecessary. The act is clearly in violation of the constitutional inhibition above quoted. There are several other points discussed in the briefs, but it is not necessary to notice them here.

The demurrer to the writ is sustained and the writ dismissed. In accordance with a stipulation of the parties, neither will recover costs.

DEMURRER SUSTAINED.

Argued July 18, reversed July 31, rehearing denied September 19, 1917.

FIRST NAT. BANK *v.* HAZELWOOD CO.

(166 Pac. 955.)

Landlord and Tenant—Assignment of Lease—Effect.

1. The liability of the assignee of the lessee arises out of privity of estate, and not of contract, and is confined to such covenants in the lease as run with the land.

Covenants—Running With Land.

2. Only real covenants run with the land.

[As to what are covenants that run with the land, see note in 56 Am. Rep. 151.]

Landlord and Tenant—Assignment of Lease—Effect.

3. Under a lease of a creamery with which the parties attempted to include certain milk routes, covenants to keep up the milk routes did not run with the land and did not bind the assignee of the lessee.

Landlord and Tenant—Assignment of Lease—Effect.

4. A covenant that the lessee would operate the leased creamery plant as an independent creamery concerns the use to be made of the premises and runs with the land.

Landlord and Tenant—Assignment of Lease—Breach of Covenant—Damages.

5. Where the lessee of a creamery covenanted to keep up cream routes and to operate the premises as an independent creamery and damages by diminishing rental value of the premises were alleged due to his failure to operate as an independent creamery, but the witnesses ascribed the damage to the loss of the cream routes, the lessor could not recover from the lessee's assignee.

Landlord and Tenant—Injury to Property—Liability.

6. Where the lessee's assignee had possession of personalty connected with the premises, he was liable to account for it as bailee, or for its value when lost or converted.

Landlord and Tenant—Personalty Connected With Premises—Loss—Damage—Evidence.

7. Where a lessee's assignee had possession of personalty connected with the leased premises and the same was lost, the value of the property at the inception of the lease was relevant in fixing the damage, which was the value of the property when lost.

From Multnomah: HENRY R. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action brought by the First National Bank of Albany against Klock Produce Company and Hazelwood Company. Klock Produce Company was not served and the controversy is wholly between plaintiff and the defendant Hazelwood Company. The complaint consists of two counts. In both counts plaintiff alleges the incorporation of the parties, plaintiff's ownership of certain real property at Albany and the lease of this property to Klock Produce Company February 28, 1912. It is alleged in both counts that a creamery building stood on the property and that the lease covered the personal property of plaintiff in the creamery. The lease ran for three years, expiring March 1, 1915. It is alleged that Klock Produce Company sold its right, title and interest in the lease to Hazelwood Company and that Hazelwood Company remained in the occupation of the premises till the expiration of the lease. Plaintiff avers that "Hazelwood Company assumed all the duties, liabilities, conditions and provisions contained in the aforesaid agreement of lease."

The first count in the complaint alleges that on the making of the lease plaintiff turned over to the lessee certain personal property; that "Hazelwood Company, as successors of the defendant Klock Produce Company continued in * * the use of said described personal property until the expiration of the aforesaid lease." It is then alleged that said defendant failed to return, replace or otherwise account for certain personal property specifically listed, and damages in the sum of $415.75 are claimed by reason of this default. It is alleged that the lease provided that the lessee agreed to take good care of the personal prop-

erty and at the expiration of the lease to turn it over to the lessor in as good condition as at the commencement of the lease, reasonable use and wear thereof excepted; the lessee to replace all of the personalty lost or destroyed.

The second count set up that the lease covered certain milk routes serving the creamery and appurtenant thereto; that the lease provided that the lessee "would operate said creamery as an independent creamery and that both parties to said lease would do their utmost to retain said milk routes and that at the expiration of said lease" the lessee "would turn over" to the lessor "said milk routes." It is alleged that the defendants violated the lease in that the creamery was not operated as an independent creamery, but in conjunction with other creameries; also that "the defendants did not do their utmost to retain said milk routes for the benefit of said creamery," and that "defendants failed and neglected to turn over said milk routes to the plaintiff" at the expiration of the lease. The complaint charges that defendants induced and forced persons supplying milk and cream to said milk routes to ship to Portland and to other creameries, and that defendants converted these milk routes to their own use after the expiration of the lease. It is alleged that these acts of the defendants destroyed the business of the creamery to plaintiff's damage in the sum of $5,000.

The answer admits the incorporation of the parties, plaintiff's ownership of the property, the execution, but not the contents, of the lease and the occupation of the premises by Hazelwood Company, from the summer of 1912 till March 1, 1915; the other allegations are denied.

Plaintiff recovered a verdict of $300 on its first count and $2,500 on its second count. Judgment was entered accordingly and defendant Hazelwood Company appeals. AFFIRMED. FIRST COUNT. REVERSED. SECOND COUNT.

For appellant there was a brief and an oral argument by *Mr. Maurice W. Seitz.*

For respondent there was a brief over the names of *Messrs. Schmitt & Schmitt* and *Messrs. Hewitt & Sox,* with oral arguments by *Mr. G. G. Schmitt* and *Mr. H. H. Hewitt.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

Appellant assigns error on the denial of its motion for a nonsuit as to the second cause of action set up in the complaint. The portions of the lease material to the consideration of this question are the following:

The lessee "agrees that he will, during the term of this lease, operate said creamery plant as an independent creamery; that he will take good care of the property delivered to him under this lease, and that he will at the expiration of this lease, turn over the said leased property to the party of first part in as good condition as the same is found at the commencement of this lease, reasonable use and wear thereof and damage by the elements excepted, and without any notice to quit, the party of the second part agreeing to replace all of the above described personal property lost or destroyed by the fault of him or his agents or employees.

"It is further understood and agreed, by and between the parties hereto, that the cream routes now serving said creamery, shall be considered a part of said demised property, as far as may be, and that both parties to this lease will do their utmost to retain

said routes for the benefit of said Creamery, and that at the expiration of said lease all of the cream routes connected with the Creamery Plant shall be turned over to the party of the first part, with the remainder of said creamery plant."

Plaintiff offered no evidence in support of its allegations that Hazelwood Company expressly assumed these covenants of the lease. The liability of Hazelwood Company, if any, must be based on the admitted fact that it occupied the demised premises from June 1, 1912, till the expiration of the lease, and on these admissions of its counsel found in the record:

"We bought out the Klock Produce Company, certain of its assets, and we knew they had a lease on the premises, but we never saw the lease, and we simply went into possession. We just went into possession. * * I am willing to concede right here that we went in there as assignees, and these other men walked out. I am willing to concede that fact."

Counsel for appellant earnestly contends that these circumstances are insufficient to charge appellant with the duty of fulfilling the above covenants in the lease.

It is said in 1 McAdam on Landlord and Tenant, page 864, that:

"Where a person other than the lessee is shown to be in possession of leased premises, paying rent therefor, the law will presume that the lease has been assigned to him."

This principle is supported by 16 R. C. L., page 863; *Carter* v. *Hammett,* 12 Barb. (N. Y.) 253, 262; *Baker* v. *J. Maier etc. Brewery,* 140 Cal. 530, 534 (74 Pac. 22); *Moline* v. *Portland Brewing Co.,* 73 Or. 532, 537 (144 Pac. 572).

It does not follow that the party so in possession is liable under all of the lessee's covenants. The rule is thus stated in 1 McAdam, page 863:

"The assignee is only liable for covenants running with the land which are broken while he is the legal assignee."

On page 875 of this work it is said that:

"An assignee is only liable for his own breaches of express or implied covenants in the lease which run with the land, so long as he retains possession by himself or his tenants."

We quote further from this author, page 864:

"So, for a covenant not running with the land, no action of covenant will lie against an assignee."

On page 890 we find:

"An assignee is not liable on a covenant that relates to something not in being at the time of the demise, or merely personal or collateral to the thing demised; as to pay a sum of money in gross, to build *de novo,* or the like, for it does not run with the land, and therefore assignees are not bound even though they be expressly named."

On page 417 McAdam says:

"A word or two will be here added as to personal covenants.

"Where a lease of land also embraces personal chattels, the lessee's covenant to return or replace, or pay for them at the end of the term does not pass to the grantee of the reversion."

In Gear on Landlord and Tenant, Section 125, it is said that:

"Third parties in possession and control of the premises are presumed to be liable for rent as assignees of the lease.

"Mere possession and claim of an assignment will not make the possessor liable on the covenants of the lease."

In 2 Underhill on Landlord and Tenant, Section 642, the rule is stated thus:

"After the acceptance of the lease by the assignee he will be liable to the lessor by reason of this privity of estate for all breaches of covenants which run with the land occurring during his occupation of the premises.

"But the assignee of a lease is not liable to the lessor for the breach of a covenant which does not run with the land unless he is expressly named in the lease."

The above rules are announced by all of the text-writers:

"An assignee of a term is not bound by the personal covenants of the lessee. But he is bound to perform all the covenants which 'run with the land,' and that without being named by the special word 'assigns' ": Woodfall's Landlord and Tenant, 295.

"In order that the assignee may be liable on the covenants in a lease, the covenants must therefore run with the land; must be connected with, be attached to, or inhere in the land": Jones on Landlord and Tenant, § 328.

"An assignee is personally liable to the lessor upon all covenants which run with the land": Taylor on Landlord and Tenant, § 109.

In 24 Cyc. 980, 982, it is said:

"The right to the benefits of covenants of the lessor, running with the land, passes to the assignee upon assignment of the lease and he is correspondingly bound thereby, after acceptance of the leasehold estate. * *

"The assignee is not bound at law by personal covenants of the lessee."

In 16 R. C. L., page 849, the rule is thus stated:

"An assignee of the leasehold is in privity of estate with the lessor and is liable to him personally for the breach of the lessee's covenants which are annexed to and run with the leasehold and which are broken while he holds the leasehold estate. * * The assignee

is not bound by collateral or personal covenants of the lessee."

The principle announced by these authorities is supported by so many adjudicated cases that it is superfluous to cite them. *Masury* v. *Southworth,* 9 Ohio St. 340, 347, is a leading case; we quote from the opinion:

"It may be, that the lessee would be liable on the covenant, but not the assignee of the lessee. There is a manifest difference between assigning a right of action, and creating, by assignment, a liability to an action. The latter must, generally, assume the shape of a contract to indemnify, and could not usually affect the rights of the party holding the original claim. It would be really a new contract, and not in the nature of an assignment of another contract. In this view of the liability of an assignee of the lease to the assignee of the reversion, the principle governing the assignment of a chose in action, or the benefit of a covenant, must be thrown out of view, and the inquiry be made on other principles and considerations.

"The covenant must run with the land—must be so connected with, be attached to, and inhere in the land, that the assignee of the reversion or the assignee of the lease, as the case may be, would have a right to the advantage of it, or be bound to perform it. Such is the general principle; but whether a covenant so runs with the land, must depend, in the first place, upon the nature and character of the particular covenant and of the estate demised, as connected with the respective rights of lessor and lessee in reference to the subject matter of the covenant; and, in the next place, upon the intent of the parties in the creation of the estate, as shown by the language of the instrument creating it, construed with reference to the relative position of the parties, and to the subject matter to which their contract and conveyance is to be applied. The nature and character of the covenant may be such that it may run with the land; and yet, if it be clearly

the agreement of the parties that it shall not so run, it would not be annexed, in despite of the agreement so expressed. And, on the contrary, however clearly and strongly expressed may be the intent and agreement of the parties, that the covenant shall run with the land, yet, if it be of such a character that the law does not permit it to be attached, it cannot be attached by the agreement of the parties, and the assignee would take the estate clear of any such covenant."

1. Plaintiff cites *Moline* v. *Portland Brewing Co.*, 73 Or. 532 (144 Pac. 572). In this case it is said:

"The assignee of a lease is bound to fulfill the obligations thereof according to the terms of the lease."

This language is to be interpreted in the light of the facts involved in that case. The action was one brought to recover the stipulated rent from a party who had accepted a written assignment of the lease from the lessee. The covenant to pay rent runs with the land and binds the lessee's assignee. The above language as applied to the controversy involved in that case is therefore accurate. The court was dealing with the obligations arising from the written assignment of a lease duly accepted by the assignee; in this case we are dealing with the presumptions of law arising from the occupation of the demised premises by a successor to the business of the lessee. The case of *Moline* v. *Portland Brewing Company* does not therefore conflict with the principles of the law of landlord and tenant announced by the above text-writers. Whatever liability was assumed by appellant grew out of privity of estate rather than privity of contract. It is confined to such covenants in the lease as run with the land.

It remains to apply these principles to the facts alleged and proved in the instant case. Plaintiff's

damage is predicated chiefly on the breach of the following covenant in the lease:

"It is further understood and agreed * * that both parties to this lease will do their utmost to retain said routes for the benefit of said Creamery, and that at the expiration of said lease all of the cream routes connected with the Creamery Plant shall be turned over to the party of the first part, with the remainder of said creamery plant."

The cream routes were circuits extending from and to Albany, as much as fifteen miles in extent, on which wagons from the creamery collected milk and cream for its use. There is no evidence that at the time when the lease was made plaintiff had any contracts with farmers under which the latter were obligated to sell their milk and cream to plaintiff or to its lessee. Plaintiff therefore had no property right which it could assign. The evidence does show that a plentiful supply of milk and cream was important to the prosperity of the business operated on the demised premises, and it tends to show that this supply could not be secured without the operation of milk routes. The evidence on behalf of plaintiff shows that farmers on the routes in question, at the inception of the lease, received one cent less per pound of butterfat for the milk and cream taken up on their farms than they received for these products delivered at the creamery in Albany; that appellant increased this differential successively to two cents and three cents; that the competing creamery continued to charge a differential of one cent; that the farmers were dissatisfied and inclined to deal with appellant's competitor, and that one of the employees of appellant, operating these milk routes, took the business on these routes to the competing creamery. Appellant

contends that the expense of collecting milk and cream always exceeded the differential charged by it and cogent testimony was offered to sustain this contention. The record contains some evidence to the contrary. Appellant's witnesses testify that the raise in the price for collection, hereinabove referred to, was due to increasing cost of collection as the season advanced, the milk supply fell off and the roads became more difficult to travel over. There is some evidence on behalf of plaintiff that appellant endeavored to divert the milk and cream on these routes to its plant in Portland.

If the above covenants were binding on appellant, there was evidence sufficient to take the case to the jury. If these covenants did not bind appellant, it was within its rights in doing the acts testified to.

2. It is elementary that only real covenants run with the land: *Mitchell* v. *Warner,* 5 Conn. 497, 503. It is said in 7 R. C. L., page 1099, that:

"It is an essential quality of a real covenant that it relates to the realty, having for its object something annexed to or inherent in or connected with land or other real property."

In 2 Greenleaf's Cruise on Real Property, 751, real covenants are thus defined:

"*Covenants real* are those which have for their object something annexed to, or inherent in, or connected with land, or other real property."

In *Morse* v. *Garner,* 1 Strob. L. (S. C.) 514 (47 Am. Dec. 565), a partition agreement allotted to certain grantees a ferry tract and provided that these grantees should be entitled to free ferriage so long as they owned the land. It was held that this agreement did not run with the land and could not be enforced by their successor in interest. The court said:

"It appears to be an essential quality of a real covenant that it relate to the realty, having for its object something annexed to, or inherent in, or connected with land or other real property; and that a personal covenant does not bind the assignee of a covenantor, even though expressly named, but charges only the executor or administrator; and that it makes no difference if such personal covenant is connected with real covenants, so as to form one entire consideration.

"A right of ferry is not then an incorporeal hereditament, nor the subject of a real covenant; and a contract, though under seal, that one should pass, toll free, is a personal contract which does not bind an assignee of the ferry."

3. Within the rules announced in these authorities the covenants with respect to the cream routes did not run with the land, nor did Hazelwood Company become bound by them. Plaintiff's remedy with reference to this part of the contract is confined to Klock Produce Company.

It is true that these routes were intimately connected with the business operated on the demised premises and that these premises were useful only for the conduct of such business. Plaintiff is entitled on this record to the conclusion that the leased property has little rental value in the absence of a creamery business conducted therein and that such a business cannot be conducted without cream routes. The cream routes, nevertheless, are not attached to real property. The covenants with reference to them are collateral to the real covenants contained in the lease. They are to be distinguished from those covenants whereby an owner of land charges it with a servitude in favor of demised premises in the hands of his lessee: *Norman* v. *Wells*, 17 Wend. (N. Y.) 136. Plaintiff had no property right in these cream routes; they were not incorporeal hereditaments. The covenants with reference to them

were not real, but personal covenants binding only upon the parties to the lease.

We do not overlook the provision in the lease which makes the personal property, and undertakes to make the cream routes, a part of the demised premises. In *Spencer's Case,* 1 Smith's Leading Cases, 137, 138, it is said:

"It was resolved, if a man leases sheep or other stock of cattle, or any other personal goods for any time, and the lessee covenants for him and his assigns at the end of the time to deliver the like cattle or goods as good as the things letten were, or such price for them; and the lessee assigns the sheep over, this covenant shall not bind the assignee, for it is but a personal contract, and wants such privity as is between the lessor and lessee and his assigns of the land in respect of the reversion. But in the case of a lease of personal goods there is not any privity, nor any reversion, but merely a thing in action in the personalty, which cannot bind any but the covenantor, his executors or administrators, who represent him. The same law, if a man demise a house and land for years, with a stock or sum of money, rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock or sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and therefore as to the stock or sum the covenant is personal, and shall bind the covenantor, his executors and administrators, and not his assignee."

In *Allen* v. *Culver,* 3 Denio (N. Y.), 284, 295, the lease provided that certain tools and chalkstones were to be part of the property leased. The lessee covenanted that this personal property should remain on the premises at the expiration of the lease and that in default thereof it should be replaced by the lessee.

This was held to be a personal covenant. The court said:

"Unless the covenant, in relation to the *tools* and *chalkstones,* is one which runs with the estate in the land, the action for the breach of it cannot be sustained in the name of the plaintiffs, but must be brought by the lessors in whom the legal interest in the contract is vested.

"Although the parties agreed that the tools and chalkstones mentioned in the covenant, should be considered as part of the premises demised, and should pass therewith, they are nevertheless mere personal chattels, out of which the rent could not issue. It is true, that the yearly value of the demised premises may have been increased by the letting of these articles of personal property; still the rent reserved continues to issue out of the land alone."

See also *Brewer* v. *Marshall,* 19 N. J. Eq. 537 (97 Am. Dec. 679).

It is very doubtful if the courts could in any event enforce so much of the contract as provides "that both parties to this lease will do their utmost to retain said routes for the benefit of said creamery." An agreement closely akin to this was held void for indefiniteness by the Washington Supreme Court: *Barton* v. *Spinning,* 8 Wash. 458, 459, 460 (36 Pac. 439). Under the principles announced by this court in *Gaines* v. *Vandecar,* 59 Or. 187, 192–194 (115 Pac. 721, 1122), and under the rule stated in 6 R. C. L., page 644, it is difficult to uphold this stipulation as binding anyone to anything.

4, 5. The covenant that the lessee would "operate said creamery plant as an independent creamery," concerns the use to be made of the demised premises and such covenants run with the land: *Duester* v. *Alvin,* 74 Or. 544 (145 Pac. 660); *St. Andrew's Lutheran Church's Appeal,* 67 Pa. St. 512; *Crowe* v. *Riley,* 63 Ohio St. 1

(57 N. E. 956). The agreement of the parties contemplated that the creamery should be independently operated throughout the term of the lease and not for a part of the term only, as contended by appellant. Plaintiff's proof is that appellant ceased churning while it was in possession of the plant and thereafter used the premises as a receiving station for milk and cream delivered by the farmers. We find no evidence of damage by appellant's violation of this covenant to operate as an independent creamery. Plaintiff's proof of damage is to the effect that the rental value of the demised premises has been diminished, but the witnesses charge this damage to the loss of the milk routes. We think, therefore, that the court erred in denying appellant's motion for a nonsuit as to the second count in the complaint.

6, 7. As to the first count in the complaint, we think that plaintiff proved a case sufficient to go to the jury. Appellant was not bound by the covenants in the lease with reference to the personal property, but the complaint sufficiently charges that appellant had the use of this personalty while it was in possession of the creamery. It was therefore liable to account for it as bailee. The jury was instructed by the lower court to charge appellant with only the value of so much of the personalty as had been lost through appellant's fault. It is true that the measure of plaintiff's damage on this branch of the case is the value of the personal property when lost, broken or converted: 8 R. C. L., p. 483. But the value of the personalty at the inception of the lease was relevant to this inquiry: *Maxson* v. *Ashland Iron Works, ante,* p. 345 (166 Pac. 37). Appellant was permitted to offer evidence bearing on the breakage and depreciation of this character of personalty.

There is evidence that a portion, at least, of the missing personal property came into the possession of appellant. The appraisal of this property was for the jury and we cannot say that its verdict in this regard is unsupported by evidence.

So much of the judgment as is based on the first cause of action is affirmed; so much of the judgment as is based on the second cause of action is reversed, with instructions to enter judgment of nonsuit.

AFFIRMED. FIRST COUNT.
REVERSED. SECOND COUNT.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Denied September 11, 1917.

PETITION FOR REHEARING.

(166 Pac. 000.)

On petition for rehearing. Rehearing denied.

Messrs. Schmitt & Schmitt and *Messrs. Hewitt & Sox,* for the petition.

Mr. Maurice W. Seitz, contra.

Department 2. MR. JUSTICE MCCAMANT delivered the opinion of the court.

Plaintiff contends in a petition for rehearing that the duty to maintain the cream routes was incidental to the operation of the plant as an independent creamery and that therefore appellant was obligated to maintain and return the cream routes. In our opinion the lease is not open to this construction. If the obligations of the lessee with reference to the cream routes

were included in the covenant to operate as an independent creamery, why mention the cream routes? The only covenants in the lease which can be properly denominated real covenants are those which relate to the use of the demised premises; the other obligations of the lessee, whether expressed in the lease or inferable therefrom, are collateral and personal. There is no escape from the conclusion that plaintiff's remedy as to these latter covenants is confined to the original lessee. We do not hold that plaintiff has no remedy for the acts complained of with reference to the cream routes, but only that it has no remedy against this appellant.

The petition also challenges the correctness of our conclusion that the evidence fails to show any damage traceable to the failure of appellant to operate the plant as an independent creamery. We have reread the testimony and are satisfied that our former conclusions are correct. The evidence shows that the premises are useful chiefly for creamery purposes and that their rental value is materially less than at the inception of the lease. Only two causes are assigned by the witnesses for this diminution in productiveness. One of these is the destruction of the business by the loss of the cream routes and the other, the competition of two other creameries in Albany, making it impossible to conduct successfully a third creamery in that city. No witness testifies that this decline in rental value is chargeable in whole or in part to the failure of appellant to operate the plant as an independent creamery.

The petition for a rehearing is denied.

Rehearing Denied.

Motion to Retax Costs Denied.

Mr. Chief Justice McBride, Mr. Justice Moore and Mr. Justice Bean concur.

Argued May 31, affirmed June 26, rehearing denied September 19, 1917.

SMITH *v.* CAMPBELL.*

(166 Pac. 546.)

Principal and Agent—Burden to Establish Relation—Action on Contract.

1. Where a third party is sought to be held on a contract alleged to have been executed by an agent, the party seeking to enforce the contract must establish the alleged agency.

Principal and Agent—Authority—Proof by Agent's Statements.

2. An agent's authority cannot be proved by his own statements that he is such an agent.

Principal and Agent—Acts of Agent—Proof Against Agent.

3. Before the acts of an agent can be shown against the principal, the agency must be shown.

Principal and Agent—Contract by Agent—Sufficiency of Evidence.

4. In an action for breach of contract, evidence *held* sufficient to sustain finding that the contract was the contract of defendant, for whom plaintiff did the work, though it was signed by defendant's son.

Evidence—Contract of Undisclosed Principal—Parol Evidence.

5. Parol evidence is admissible to charge a principal on a simple contract, not negotiable, wherein the agent appears as principal, and to show that the contract was executed for the principal with intent to bind him, though signed by the agent alone.

[As to suits by undisclosed principals on contracts made with their agents, see note in 55 **Am. St. Rep.** 916.]

Logs and Logging—Agreement to Saw—Sale of Standing Timber.

6. An agreement to saw timber is not governed by the rule as to the sale of standing timber.

Logs and Logging—Contracts to Saw Timber—Consideration.

7. Where plaintiff agreed to saw the timber on defendant's land for so much a cord, defendant to retain title to the saw outfit furnished plaintiff until the full price was paid by deductions from the price payable to plaintiff for his work, the contract was supported by sufficient consideration.

Frauds, Statute of—Promise to Answer for Debt or Default of Another.

8. Where defendant contracted with plaintiff that plaintiff should saw the timber on defendant's land for a price per cord, the agreement being made by defendant himself, and the written memorial being executed in his presence by his son, whose name was inserted, as he was going to look after the supervision of the work on the

*On right of court to grant new trial on its own motion or on grounds other than those urged by moving party, see note in 40 **L. R. A. (N. S.)** 291. REPORTER.

ground, defendant's promise was not within the statute of frauds as a promise to answer for the debt or default of another, but an agreement by defendant to pay his own debt.

Principal and Agent—Authority of Agent—Evidence.

9. In an action for breach of contract whereby plaintiff agreed to saw the timber on defendant's land for a price per cord, defendant's statements were admissible to prove the authority of his son, who executed the contract, to act for him.

New Trial—Correction of Error by Trial Court.

10. When the trial court timely discovers that an error has been effected to the prejudice of the defeated party, so that the determination would be reversed on appeal, it may correct the error by setting aside the judgment and granting new trial.

From Multnomah: JOHN P. KAVANAUGH, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action to recover damages for the breach of a contract alleged to have been entered into by plaintiff, Oscar L. Smith, and defendant, Floyd J. Campbell, on March 6, 1914, for the sawing of the timber upon a certain forty-acre tract of land owned by defendant. It is averred that Mart D. Campbell executed the contract as the agent of Floyd J. Campbell; that according to its terms the defendant was to furnish plaintiff with a saw outfit known as the "King of the Woods" for the sum $325, defendant to retain title to it until the full amount was paid by deducting twenty-five cents a cord from the price of forty cents a cord which was payable to him on the first and fifteenth of each month for his work; that if Smith discontinued the work before all the timber was cut he should forfeit all right to the saw outfit and any amounts then due him from the defendant. The agreement was signed by M. D. Campbell and witnessed by Floyd J. Campbell. It is further set forth that plaintiff entered upon the performance of the contract and sawed 712 cords of wood; that on July 1, 1914, by mutual agreement of plaintiff and defendant, the con-

tract was modified so that in addition to the sawing Smith should fall and trim the timber, receiving sixty cents a cord, but no more than forty-five cents prior to the full payment of the outfit and after that no more than forty-five cents a cord until the contract was completed; that thereafter plaintiff cut 970 cords of the wood; that defendant applied upon the payment of the outfit $316.51 to the plaintiff's damage in said sum; that 2,000 cords remained to be cut; that defendant failed and refused to pay any part of the thirty-five cents a cord as agreed, and, on November 1, 1914, wrongfully refused to perform the contract, took possession of the saw outfit and the land, and refused to permit plaintiff to perform the agreement as modified, to the latter's damage in the sum of $1,000.

The answer of the defendant consisted of a general denial of the complaint. After plaintiff introduced evidence, made an offer of proof, and rested his case, counsel for defendant moved for a "nonsuit on the ground that plaintiff has failed to establish by any competent evidence or offer of proof that the contract sued upon is the contract of the defendant, Floyd J. Campbell," and has failed to establish the allegations of his complaint. The court granted the motion. Thereafter the trial court on motion of plaintiff set aside the judgment of nonsuit and granted plaintiff a new trial, from which order defendant appeals. AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilson, Neal & Rossman,* with an oral argument by *Mr. Oscar A. Neal.*

For respondent there was a brief over the names of *Mr. Henry J. Bigger* and *Mr. Julius N. Hart,* with an oral argument by *Mr. Bigger.*

MR. JUSTICE BEAN delivered the opinion of the court.

1–3. Counsel for defendant correctly submit that where a third party is sought to be held upon a contract alleged to have been executed by an agent, the party seeking to enforce the contract must establish the alleged agency: *Hahn* v. *Guardian Assurance Co.,* 23 Or. 576 (32 Pac. 683, 57 Am. St. Rep. 709); *Jameson* v. *Coldwell,* 25 Or. 199 (35 Pac. 245); *Connell* v. *McLoughlin,* 28 Or. 230 (42 Pac. 218); *Rumble* v. *Cummings,* 52 Or. 203, 208 (95 Pac. 1111); that an agent's authority cannot be proved by his own statements that he is such an agent, and before the acts of the agent can be shown against the principal, the agency must be shown: *Harrisburg Lumber Co.* v. *Washburn,* 29 Or. 150 (44 Pac. 390); *Connell* v. *McLoughlin,* 28 Or. 230 (42 Pac. 218); *Wicktorwitz* v. *Farmers' Ins. Co.,* 31 Or. 569 (51 Pac. 75); *Hannan* v. *Greenfield,* 36 Or. 97 (58 Pac. 888); *Sloan* v. *Sloan,* 46 Or. 36 (78 Pac. 893); *Toomey* v. *Casey,* 72 Or. 290 (142 Pac. 621).

The main and only important question in this case is: Did the plaintiff produce or tender any competent evidence tending to show that M. D. Campbell was acting as the agent of Floyd J. Campbell in the transaction set forth in the complaint? To determine this we will examine the testimony. Plaintiff, Oscar L. Smith, testified in substance as follows:

"I told him [Floyd J. Campbell] I had heard he wanted some one to saw some wood, that he had bought a drag-saw, and he said he had. He said he wanted some one to take the contract of cutting all the wood on forty acres that he owned out near Sherwood, and wanted to know what I could cut it for. I told him I would have to see the timber first. He said that I could go and look over the timber and he had the drag-saw, and he would sell me the drag-saw at $325 and pay for it at so much a cord. So, on the following day

I went up and the son, Mr. Mart Campbell, was there, and we agreed to go out and look over the timber, and we went out there."

Mr. Smith stated that they met and agreed upon the terms of the contract. As to the conversation had with Mr. Floyd Campbell in regard to the signing of the agreement the witness testified thus in part:

"Well, I went up to Mr. Campbell's office, and he showed me the contract he had fixed up and I read it over, and I seen it was made in Mr. Mart Campbell's name. * * Well, I asked him about the contract, or whose it was and he said he was responsible for everything, he just put the boy's name in there, and he was going to handle that end of it in the woods, and he would be responsible for everything, and naturally it was his contract."

Lewis Gillis, a witness to the contract, testified to the effect that Floyd J. Campbell said the agreement was his, that he would "stand for all" and pay all bills.

4. It was the contention of the defendant that the evidence tended to show a promise on the part of Floyd J. Campbell to answer for the default of his son, and the court struck out the evidence. The jury might reasonably have found from the testimony, had it been submitted to them, that it was the debt and contract of Floyd J. Campbell, for whom plaintiff did the work. The salient feature of the evidence, however, as to the agency of Mart D. Campbell was the statement of Floyd J. Campbell that "he would have him [Mart D. Campbell] look after it" (meaning the work) and that "he just put the boy's name in there," referring to the contract. Plaintiff tendered the contract in evidence and the following testimony that:

"Oscar L. Smith entered upon the performance of the same, and performed the same according to its

terms up to and until about the first day of July, 1914, and at that time said contract was modified as alleged in his complaint, and that thereafter on or about the 20th of October, 1914, the defendant, Floyd J. Campbell, appeared upon the premises described in the contract, and terminated said contract, and told the plaintiff that he could no longer saw wood upon said premises. That he would pay him no more money for his work, for the reason that the right of way out of which he hauled the wood, had been closed and that it cost him more to get his wood cut, and he could not make anything out of it. And at that time the said Floyd J. Campbell offered to let the plaintiff have the saw for what he had paid on it, if he would give him a mortgage back for the balance due thereon. * * Plaintiff also offers to prove that the saw mentioned in plaintiff's complaint was bought by and in the name of Floyd J. Campbell, and paid for by Floyd J. Campbell; that the plaintiff, Smith, was paid by Floyd J. Campbell, all the payments made under said contract during the time the plaintiff was working in and about the sawing of said wood. * * "

And that the son merely attended to the cutting and piling of the wood as agent for his father.

5–10. According to the great weight of authority parol evidence is admissible to charge a principal, in this instance, Floyd J. Campbell, on a simple contract not negotiable wherein the agent, here claimed to be Mart D. Campbell, appears as principal, and to show that the contract is executed in the business of the principal and with intent to bind him, although signed by the agent alone: 31 Cyc. 1659. This is the holding in this state: *Barbre* v. *Goodale,* 28 Or. 465, 470 (38 Pac. 67, 43 Pac. 378); *Anderson* v. *Portland Flouring Mills Co.,* 37 Or. 483 (60 Pac. 839, 82 Am. St. Rep. 771, 50 L. R. A. 235); *Riddle State Bank* v. *Link,* 78 Or. 498 (153 Pac. 1192). This rule is not directly questioned by the defendant. The agreement for cutting the wood, upon

which this action is based, is not governed by the rule as to the sale of standing timber. It was supported by a sufficient consideration, being to promote the interest of the defendant, Floyd J. Campbell, and the promise was not within the statute of frauds. It was an agreement by the defendant to pay his own debt and not that of another: *Bauer* v. *Northwest Blow-pipe Co.*, 75 Or. 1 (146 Pac. 129); *Davis* v. *Patrick*, 141 U. S. 479 (35 L. Ed. 826, 12 Sup. Ct. Rep. 58). In the present case the evidence of plaintiff tended to show that the agreement was made by the defendant himself and that the written memorial thereof was executed in his immediate presence by his son whose name was inserted as he was going to look after the supervision of the work on the ground. If this is true there could be but little chance for questioning the authority for the action of the younger Campbell. The statements of the defendant were clearly admissible. On this point the evidence fills the measure of the rule declared by Mr. Justice MOORE in *Rumble* v. *Cummings*, 52 Or. 203, 208 (95 Pac. 1111).

The evidence as to damages, a phase of the case which was practically not reached, indicated that plaintiff had lost all the payment on the saw outfit. The case was really determined upon the matter of agency. There was sufficient testimony tended to take the case to the jury and the trial court committed no error in reversing its ruling and granting plaintiff a new trial. When the trial court timely discovers that an error has been effected to the prejudice of the defeated party so that the determination would be reversed upon appeal if not corrected by the trial court, it may correct the error by setting aside the judgment and granting a new trial: *De Vall* v. *De Vall*, 60 Or. 493 (118 Pac. 843, 120 Pac. 13, Ann. Cas. 1914A, 409, 40 L. R. A.

(N. S.) 291); *Sullivan* v. *Wakefield*, 65 Or. 528 (133 Pac. 641); *Smith & Bros. Typewriter Co.* v. *McGeorge*, 72 Or. 523 (143 Pac. 905).

Finding no error in the record the judgment of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued July 6, affirmed July 24, rehearing denied September 19, 1917.

NELSON *v.* UNITED RAILWAYS CO.

(166 Pac. 763.)

Appeal and Error—Reversible Error—Admission of Incompetent Testimony.

1. In an action for injuries alleged to have been caused by the failure of defendant railway's servant to render suitable assistance to plaintiff disembarking from its car, permitting one familiar with the road in question to testify, over objection, that at some stations there would be good platforms and at others, used by a very small number, the platforms were rough, etc., was not reversible error; the evidence not being sufficiently material, although it may have been incompetent.

Carriers—Safe Place to Disembark—Duty of Railway Company.

2. It is the duty of a railway company to provide safe and convenient means for entering and leaving its vehicles, but it is not bound to exercise an infallible judgment in such matters.

[As to duty of railroad companies to keep stations safe for passengers and others, see note in 29 **Am. St. Rep.** 55.]

Carriers—Injuries to Passengers—Safe Place to Disembark—Questions for Jury.

3. Whether the failure of defendant's servants to furnish a stool for plaintiff to step on when she alighted from the car constituted negligence on the part of the railway, or whether the brakeman rendered proper and adequate support when she disembarked at the station, were questions for the jury.

From Multnomah: T. E. J. DUFFY, Judge.

Action by Charlotte Nelson against the United Railways Company, to recover for personal injuries al-

leged to have been caused by the negligent act of defendant and its employees. From a verdict in favor of defendant, plaintiff appealed. Affirmed.

Department 2. Statement by MR. JUSTICE BEAN.

This is an action for personal injuries alleged to have been caused plaintiff, by the negligent acts of the defendant's servants in failing to render her suitable assistance in disembarking from its car. The cause was tried to the court and a jury and a verdict rendered in favor of defendant. From the judgment thereon plaintiff appeals, assigning errors.

The plaintiff's case is stated in her counsel's brief in substance as follows: On January 13, 1915, she boarded one of defendant's cars in Portland bound for Glenn Harbor, one of its stations a short distance from the town of Linnton. The train stopped there for the purpose of discharging passengers. The brakeman got off the car, took the plaintiff's umbrella, and taking hold of her hand tacitly invited her to jump from the steps to the ground, a distance of between two and three feet. There was no platform, and in striking the ground which was covered with cobblestones the plaintiff sprained, twisted, or bruised her right knee dislocating the semi-lunar cartilage and rendering her a cripple for life.

The defendant company is charged with negligence in not providing a safe and proper place for the alighting of its passengers at Glenn Harbor; in not furnishing steps or other means so that passengers might embark and disembark in safety; in operating its cars with steps too high and too far from the ground; and in failing and refusing to use a bench or stool in order that the passengers might safely land. It is also charged that the agents of the defendant failed prop-

erly to support and assist the plaintiff, in leaving the car, although she was a woman of more than fifty years and rather frail and delicate physically. Defendant's counsel in their brief make an additional statement to the effect that at the time of the accident complained of, because of the rain and the soft gravel of the platform, the brakeman concluded not to use the stepping-block fearing it might turn with the weight of the passenger, but took Mrs. Nelson by the arm and assisted her in stepping to the ground. The distance from the car-step to the ground was 22 inches as shown by measurements offered by defendant, and it was estimated by plaintiff to be between two and three feet. No intimation was given the train employees that Mrs. Nelson had sustained any injury in alighting from the car and defendant contends that the record discloses that it was questionable whether any ill effects remained at the time of the trial. The charge of negligence is that a safe and proper place for the alighting of passengers was not provided and this is explained to mean that in view of the distance from the car-steps to the ground the brakeman should have used his stepping-block. These statements show the contentions of the opposing parties. The particular contention of the plaintiff in this case is that the trial court erroneously permitted damaging evidence to be admitted over the objection of plaintiff which manifestly influenced the jury in its verdict. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. M. Idleman.*

For respondent there was a brief over the names of *Mr. C. A. Hart* and *Messrs. Carey & Kerr,* with an oral argument by *Mr. Hart.*

MR. JUSTICE BEAN delivered the opinion of the court.

1. At the inception of the trial Mrs. Charlotte Nelson, upon interrogatories of her counsel, set the pace for the introduction of the testimony complained of by testifying to the following effect: On the day mentioned she went from Portland to Glenn Harbor, paying her fare. When she reached there the brakeman got down, put up her umbrella because it was raining awfully hard, and reached up his hand and took hold of her's to assist her. When she got to the lower step she had to jump down. The brakeman did not support her "very much." He furnished her with no stepping-block or stool. She stated she could not tell the exact measurement from the lower step to the ground, but that "it would come up to about my hip."

"Q. Somewhere between the knee and the hip?

"A. Yes; because when I was on the ground and reached up my hand they took mine. I know that, for I boarded the car, that same car, and at other places it was all I could do to get up from the ground to the lower step.

"Q. That is all level ground?

"A. Yes, sir.

"Q. A platform there?

"A. Yes; but this platform was all packed with all sizes of round rock, all the way from your fist down to little pebbles."

She testified that when she alighted her ankle and knee and whole limb hurt. It is in evidence that she took no regular treatment for her injuries. The defendant company used a foot-stool at times for passengers to alight. At the beginning of the unfolding of the testimony on the part of defendant, W. E. Burkhalter, a civil engineer, testified in effect that he was familiar with defendant's railroad line and with the station facilities in different places to a certain extent;

that especially between Portland and Linnton it was practically street-car service. He gave a detailed description of the surburban travel, stating that stops were frequently made to accommodate passengers where people wanted to get off at places not on the time card. To the interrogatory: "What sort of facilities would be at such places?" defendant objected, and, as the trial court explained, in order to lead up to the matter the witness was permitted to answer as follows: "At points where a great number of people used the station platform there would be a good platform, and at points which were only used by a very small number, the platform would be very rough, depending—the condition of the platform would vary as to the number of people that used the station." Plaintiff's counsel saved an exception to the ruling of the court and assigns the same as an error for which a reversal of the judgment is asked. It will be noticed that while the want of a proper and safe place for the plaintiff to alight from the car is alleged, yet the gist of the evidence is directed to a failure adequately to assist the plaintiff in alighting; that the brakeman failed to give her much assistance in alighting from the car and failed to furnish her any stool for that purpose. She stated that there was a platform there, and mentioned the want of facilities for boarding and alighting from the car at other places. It is apparent that the testimony objected to is general, and it may be far fetched or of little materiality. It was held in *Illinois Surety Co.* v. *Frankfort Heating Co.*, 178 Ind. 208 (97 N. E. 158), that it is not competent to establish the quality or efficiency of the machine in controversy by proving that of a machine sold to some one else. That the testimony objected to was important or touched upon a pivotal or determinative issue in the

case we are unable to observe. It does not appear to have been introduced as an excuse for any defect in the facilities furnished by defendant at the station mentioned. As we understand the outline given by the witness the description covers this station as well as others. In so far as it had a bearing upon the issue it was in part favorable to plaintiff. It is impossible to conceive that the evidence admitted over the objection of counsel for plaintiff influenced the verdict rendered. Whatever may be said as to its competency it was not of sufficient materiality upon which to base a reversal: *Brown* v. *Oregon-Wash. R. & N. Co.*, 63 Or. 396 (128 Pac. 38); *Schulte* v. *Pacific Paper Co.*, 67 Or. 334 (135 Pac. 527, 136 Pac. 5); *Mackay* v. *Commission of Port of Toledo*, 77 Or. 611, 619 (152 Pac. 250). There is little question in regard to the law. The difficulty, if any, is as to its application.

2. It may be stated as a general rule that it is the duty of a common carrier to provide safe and convenient means of entering and leaving its vehicle. This includes the exercise of due care in the construction and keeping in at least a reasonably safe condition the steps of cars and other appliances for enabling passengers to board and alight from its cars. It is not, however, bound to exercise an infallible judgment in such matters, and is generally considered to be guilty of no breach of duty if the method of construction adopted is in common use and approved by experience, but it has been held that it cannot excuse itself unless the appliances used by it were reasonably safe, though they were such as had been adopted and used by others. It may be the carrier's duty under certain circumstances to provide a stool or box for the use of a passenger entering or leaving its car, for instance, where the steps of such car are inconveniently high,

or where the car has been stopped at a point where there is no platform. Whether or not the carrier has been negligent in the construction of its steps or in furnishing other appliances for enabling the passenger to board and alight from its vehicle is usually a question for the jury under the facts of the particular case: 4 R. C. L., p. 1233, § 653. In the notes to *Thompson* v. *Gardner etc. St. Ry. Co.* (Mass.), 118 Am. St. Rep. 473, we find:

"It is the duty of a street railroad company to know that the place where its cars stop to discharge passengers is a reasonably safe place, and a passenger can assume it is safe, unless obviously dangerous; *Mobile Light & R. Co.* v. *Walsh,* 146 Ala. 290 (40 So. 559, 9 Ann. Cas. 852)."

It is also there said:

"The rule holding street-car companies liable for negligence if they fail to provide passengers a place to alight in safety is because the relation of carrier and passenger does not cease until the passenger is safely off the car. * * Thus, when the steps of the car are so high that a passenger cannot conveniently alight, the company is negligent if it fails to furnish a box or platform, or assist the passenger in alighting, or warn him of the danger and give plenty of time: *Truesdell* v. *Erie R. Co.,* 114 App. Div. 34 (99 N. Y. Supp. 694.)"

It is for the jury to determine in a particular case whether the carrier was negligent in its failure to provide a stool to assist passengers to alight: Note to *Traphagen* v. *Erie R. Co.,* 9 Am. & Eng. Ann. Cas. 965; *Missouri Pac. Ry. Co.* v. *Wortham,* 73 Tex. 25 (10 S. W. 741, 3 L. R. A. 368, and note); *Missouri etc. R. Co.* v. *Sherrill,* 32 Tex. Civ. App. 116 (72 S. W. 429).

3. Whether or not the failure of the defendant's servants to furnish a stool for plaintiff to step on when

she alighted from the car constituted negligence on its part, or whether or not the brakeman rendered her proper and adequate support when she disembarked from the car at the station named, were questions for the jury under all the facts and circumstances of the case to be determined under proper instructions by the court as to the law. This determination having been made, and finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued May 29, reversed June 26, rehearing denied September 19, 1917.

WEYERHAEUSER LAND CO. *v.* BOARD OF EQUALIZATION.

(165 Pac. 1164.)

Taxation—Excessive Valuation—Evidence—Sufficiency.

1. In an appeal from a decision of the board of equalization refusing to lower a tax on petitioner's timber land, *held* under evidence that petitioner failed to establish that the estimates upon which the assessment was based were incorrect or that the land was assessed for more than its cash value.

Taxation—Assessment—Review by Court.

2. To warrant a reduction of an assessment upon appeal to this court, it must be shown that the means adopted by the assessor were wrong and that the result arrived at was greater than the actual cash value of the property assessed, in view of Laws of 1913, page 325, section 8, providing that, if the court finds that the assessment was made fairly and in good faith at actual cash value, the assessment shall be approved.

Taxation—Assessment—Review.

3. The valuation placed upon property by the assessor for the purpose of taxation is *prima facie* correct, and a party assailing an

assessment as excessive must make it appear that the assessment does not represent the fair value of the property.

[As to remedy of owner of particular class of property assessed at greater per cent of value than other property, see note in **Ann. Cas.** 1914D, 916.]

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. JUSTICE BEAN.

On September 19, 1914, the Weyerhaeuser Land Company filed with the board of equalization of Clackamas County, Oregon, its petition for the reduction of the assessment of certain lands for the purpose of taxation. It is specifically set forth therein in substance that all the property described was assessed at more than its true cash value on March 1, 1914; that the assessment was based on a certain cruise and estimate of the timber on said lands for the county which was incorrect:

Description of Property.	Sec.	Tp.	R.	Assessor's Valuation.	Cash Value Alleged.	Should be Assessed Valuation.
All of	12	5 S.	4 E	$28530	$14500	$8700
All of	14	5 S.	4 E	33250	15500	9300
E½ SE¼ of SW¼	20	5 S	4 E	33085	13000	7800
All of	24	5 S	4 E	35950	19500	11700
All of	20	6 S	4 E	17025	15500	9300
N½	26	6 S	4 E	9120	5500	3300
All of	28	6 S	4 E	15930	15000	9000
Lots 1, 2, 3, 4 and E½ of W½	30	6 S	4 E	15255	13000	7800

that the assessment should be 60 per cent of the cash value in accordance with the taxation of other timber land in that county and with the uniform system adopted by the assessor. The assessment was made upon the following basis, to wit: One dollar per acre for the real property exclusive of timber; fifty cents per thousand for merchantable yellow fir, red fir, spruce, cedar, larch, and pine timber on such real prop-

erty, and thirty cents per thousand for the merchantable hemlock timber standing upon the lands. The assessment and valuation of the properties was made all in accordance with the amount thereof shown by a pretended cruise and report. Upon a reduction being denied by the board of equalization an appeal was taken by the Weyerhaeuser Land Company to the Circuit Court where, upon a hearing, findings of fact were made and, with the exception of two parcels, the value of the land was adjusted as prayed for in the petition as follows:

Description of Property.	Sec.	Twp.	R.	Valuation.
All of	12	5 S	4 E	$16170.00
All of	14	5 S	4 E	13777.00
E½, SE¼ SW¼	20	5 S	4 E	17630.00
All of	24	5 S	4 E	22673.50
All of	20	6 S	4 E	16824.00
N½	26	6 S	4 E	5428.00
All of	28	6 S	4 E	15930.00
Lots 1, 2, 3, 4, and E½, W½	30	6 S	4 E	15255.00

From a decree rendered accordingly the county appeals, assigning error in so reducing the assessment.

On November 23, 1912, the County Court of Clackamas County made a contract with M. G. Nease to make a careful cruise and estimate of the timber lands of that county. A bond for the faithful performance of such duty was required and given. Thereafter experienced timber cruisers employed by him cruised the timber on such lands including the property in controversy. With a view to contesting the assessment the Weyerhaeuser Land Company engaged expert cruisers and had the timber on the lands estimated. These men were witnesses in the case and supported their respective cruises by their sworn evidence. Other wit-

nesses also testified in the case. The cruisers for the county qualified as witnesses and testified as to the merchantable timber on the lands in accordance with the following table:

	Stoddard.	Hart.	Olinger.	Clark.
All of Sec. 12	50,700,000 feet			
Tp. 5 S R 4 E	8,300,000 feet			
All of Sec. 14				
Tp. 5 S R 4 E	44,400,000 feet			
	34,700,000 feet			
E½, SE¼ of SW¼ of Sec. 20		65,734,000 feet		
Tp. 5 S R 4 E		400,000 feet		
All of Sec. 24		68,350,000 feet		
Tp. 5 S R 4 E		3,750,000 feet		
All of Sec. 20			31,250,000 feet	
Tp. 6 S R 4 E			2,535,000 feet	
N½ of Sec. 26				
Tp. 6 S R 4 E				18,700,000 feet
All of Sec. 28			28,600,000 feet	
Tp. 6 S R 4 E			3,300,000 feet	
Lots 1, 2, 3, 4, and E½ of W½ of Sec. 30			27,400,000 feet	
Tp. 6 S R 4 E			6,875,000 feet	

The gist of the testimony of the witnesses for the company, who qualified as expert cruisers, as to the merchantable timber upon the premises is shown by the following tabulation:

		McCutcheon.	Smith.	Williams.	Hamilton.	McDonald.
All of Sec. 12	Fir	15,871,000 Ft	30,000,000 ft	30,526,000 ft		
Tp. 5 S R 4 E	Hemlock	1,465,000	1,775,000 ft	not seg.		
All of Sec. 14		12,594,000 ft	22,145,000 ft	21,721,000 ft		
Tp. 5 S R 4 E		6,520,000 ft	6,885,000 ft	8,000,000 ft		
E½ SE¼ of SW¼ of Sec. 20		15,321,000 ft	34,540,000 ft	31,405,000 ft		
Tp. 5 S R 4 E		368,000 ft				
All of Sec. 24			43,675,000 ft	45,375,000 ft		
Tp. 5 S R 4 E			655,000 ft			
All of Sec. 20					30,304,000 ft	22,030,000 ft
Tp. 6 S R 4 E					3,245,000 ft	2,430,000 ft
N½ of Sec. 26		5,292,000 ft			8,937,000 ft	8,130,000 ft
Tp. 6 S R 4 E		585,000 ft			2,135,000 ft	670,000 ft
All of Sec. 28		18,450,000 ft			29,103,000 ft	26,885,000 ft
Tp. 6 S R 4 E		2,365,000 ft			4,655,000 ft	3,695,000 ft
Lots 1, 2, 3, 4, and E½ W½ Sec. 30 Tp. 6 S R 4 E		12,542,000 ft 3,330,000 ft			13,806,000 ft 8,550,000 ft	15,485,000 ft 4,325,000 ft

The different cruisers made notes of the kind and character of the timber, whether thrifty, sound, or defective, and an examination of the logging conditions. They also made a map of the different tracts showing to a certain extent the topography of the country, the different elevations, the streams, etc., and the location of areas where the timber was burned off or for any reason was lacking thereon.

REVERSED.

For Clackamas County and the Board of Equalization thereof, as appellant, there was a brief over the names of *Mr. Gilbert L. Hedges,* District Attorney, and *Messrs. Wilbur, Spencer & Beckett,* with an oral argument by *Mr. Hedges.*

For Weyerhaeuser Land Company, as respondent, there was a brief over the names of *Mr. C. L. Starr* and *Messrs. Littlefield & Maguire,* with oral arguments by *Mr. Edwin V. Littlefield* and *Mr. Starr.*

MR. JUSTICE BEAN delivered the opinion of the court.

It appears from the evidence that the assessor who had had four or five years' experience in office, after obtaining the best information that he could, fixed the value of the timber on the lands involved at fifty cents per thousand for merchantable timber, except hemlock which he valued at thirty cents. Some timber in that locality closer in to market he placed at a greater value. His good faith in the matter is not questioned by the taxpayer. While there is little contention here as to the value of the timber per thousand there was considerable evidence introduced on behalf of the property owner to the effect that in the opinion of its experts the timber had no actual, but

only a chance or speculative value on account of its location. With this claim we are unable to agree.

The following shows the trend of the evidence as to value: For the petitioner evidence was adduced in effect as follows: Mr. W. L. Smith testified that it was a very cheap stumpage and would have to be held for a long time; that he would not want to say it was worth fifty cents per thousand. George Williams' testimony is in substance that the timber and ground were rough. The opinion of J. A. Hamilton was shown by his saying that he "would not recommend any man to purchase that amount of timber regardless of price," because the country was rough and hard to log; that in section 20 the cost of logging would more than overbalance the value of the timber; that as to sections 20 and 26 the sum of $9,400 each was more than they were worth; that the latter section in his opinion had no present market value; that no timber on the Molalla River (in the vicinity of which the timber in question is located) had any commercial value at the time he looked at it; that he "would not recommend to any man to put a two bit piece in that country in any section that I cruised." Alex McDonald stated that to transport the timber probably twenty miles of railroad would have to be built from Molalla; that "the first nine miles is right through the valley and very easy to build"; that up the river it was rocky and there was a 1,200-foot grade to overcome; that twelve or fourteen dollars an acre was enough for the land. Other witnesses testified to the same purport. We note this evidence for the purpose of demonstrating that there was a tendency to cry down the worth of the timber. This is only natural as it is to be expected that a property owner will endeavor to have his property assessed as low as pos-

sible. We believe from this that agents of the owner who were working for the purpose of assailing the assessment would naturally be inclined in the selection of merchantable timber and in estimating the amount thereof to minimize the same.

On the other hand on behalf of the county the following is an example of the testimony: Mr. M. F. McCowan, a cruiser, testifying in regard to the timber on section 12, stated that it was of a good quality, worth $1.00 per thousand, and some of it was old but not very defective. In regard to section 14 the witness said that the elevation was high; that " the fir is not very good. The lower part, on the creeks, is better. But the larch is of a good quality"; that the logging conditions were "not as good as they were on 12" but not bad; that it was a down hill pull to Clear Creek, and a good grade; that the timber was worth $1.00 per thousand; that as to section 25 the hemlock and spruce were worth $1.00 per thousand and the fir $2.00; that the logging was good for hauling the timber to Canyon Creek.

It is shown that the county cruisers, with the exception of Mr. Hart, who went through a forty-acre tract twice, cruised the timber by what is termed the "square method," going through once and measuring and counting the trees on eight acres of the forty. The cruisers for the company made a "four-time cruise" going through a forty-four times thus dividing it into ten-acre strips. Much stress is laid upon this method by petitioner as being more accurate. It is explained on behalf of the county that a four-time cruise is better if there is a great distinction in the different kinds of timber, but that it is no better if the timber is even.

1, 2. From a careful study of all the evidence and the above tables it does not appear that the difference in the manner of cruising would account for, or cause the radical variation in the amount of timber cruised as between the cruisers for the county and those for the company; nor is it shown that the estimates upon which the assessment was based were incorrect or that the value of the land, of which the timber was an important ingredient or factor in fixing its value, was more than the actual cash value or more than a fair valuation for the assessment as made in that county.

The petitioner undertook to prove that the rating of the kinds of timber mentioned at fifty and thirty cents per thousand was too great. In this it failed. It was incumbent upon it to show that the amount of timber which was the basis of a large part of the assessed value as shown by the cruise made on behalf of the county was too large. This it endeavored to do, but in this it also failed. It is not enough to show that some method other than that adopted by the assessor in making the assessment would be better. In such case it must be shown that the means adopted by that official are wrong and that the result arrived at is greater than the actual cash value of the property assessed. Leaving out of the question the burden of proof as to the value of the property we believe from the evidence that the county's cruise is a fairly accurate estimate conscientiously made by competent men who testified in support thereof, thereby authenticating the count; and that it was fairly and judicially adopted by the assessor who placed a conservative value thereon which, added to the small sum of $1.00 per acre for the land, constituted a valid assessment which has not been successfully assailed by the taxpayer. We are wholly gov-

erned by the evidence in this matter. To a large extent an assessment depends upon one's judgment. If the method by which the assessor arrived at the value of the property was correct and the assessment was in good faith fairly made, we are not permitted under the statute as we read it, to pit our judgment as to the value against that of the assessor, although other men of equal ability and fairness might differ in estimating the value of the property. Injecting another estimate into the consideration of the case would inevitably change the method or system and tend to destroy the approximate uniformity. The assessor acts judicially, yet his finding as to the valuation is much the same as the verdict of the jury upon a question of fact.

As to the law, the important question involved is largely governed by Chapter 184, Laws 1913, p. 325, Section 8 of which in part directs thus upon an appeal from the action of the board of equalization:

"If, upon hearing, the court finds the amount at which the property was finally assessed by the board of equalization is its actual full cash value, and the assessment was made fairly and in good faith, it shall approve such assessment; but if it finds that the assessment was made at a greater or less sum than the actual full cash value of the property, or if the same was not fairly or in good faith made, it shall set aside such assessment and determine such value."

3. It appears to be a firmly established rule that the valuation placed upon property by the assessor for the purpose of taxation is *prima facie* correct, and a party assailing such an assessment as excessive must make it clearly appear that the assessment does not represent the fair value of the property assessed: *Steel* v. *Fell,* 29 Or. 272 (45 Pac. 794); *Oregon Coal etc. Co.* v. *Coos County,* 30 Or. 308, 310 (47 Pac. 851);

Southern Oregon Co. v. *Coos Co.*, 39 Or. 185 (64 Pac. 646); *Elmore Packing Co.* v. *Tillamook County*, 55 Or. 218, 222 (105 Pac. 898); *Northern Pac. Ry. Co.* v. *Clatsop Co.*, 74 Or. 250, 256 (145 Pac. 271); *People* v. *Davenport*, 91 N. Y. 581; 37 Cyc. 1069, 1104 et seq.

Some clerical errors are mentioned by the assessor in his evidence which should be corrected. It follows that the judgment of the trial court must be reversed and the assessment as made by the assessor of Clackamas County, after correcting the errors named, and as equalized by the board of equalization of that county is approved. REVERSED. REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BURNETT and MR. JUSTICE MCCAMANT concur.

Argued September 8, affirmed November 28, 1916.
Modified and affirmed on rehearing July 31, mandate recalled and corrected as to costs September 19, 1917.

STENNICK *v.* J. K. LUMBER CO.

(161 Pac. 97; 166 Pac. 951.)

Logs and Logging—Sales of Timber—Rescission—Evidence.

1. In a suit to rescind a contract for the sale of timber, evidence *held* insufficient to show that defendants intentionally misrepresented the amount of timber on the tracts involved.

Logs and Logging—Sale of Timber—Misrepresentations—Effect of Writing.

2. That an alleged misrepresentation as to the quantity of timber involved in a contract was written into the contract does not add to its efficacy or make it fraudulent.

Contracts—Rescission—Fraud—Evidence.

3. Where it is sought to set aside a contract for fraud, the evidence should be clear and satisfactory; it being a maxim of law that fraud is never presumed.

[As to burden of proving fairness of transaction, see note in Ann. Cas. 1912A, 704.]

Logs and Logging—Sales of Timber—Validity of Contract—Fraud.

4. In order to have a rescission of a sale of timber for fraud, plaintiff must show that defendants made a material representation; that it was false; that when they made it they either knew it was false or made it recklessly without knowledge of its truth, as a positive assertion; that it was made with intent that it should be acted upon by the opposite party; that such party did act in reliance upon it and suffered injury.

Logs and Logging—Sales of Timber—Rescission of Contract—Evidence.

5. In a suit to rescind a sale of timber, evidence *held* to show that representations made by defendants as to the quantity of timber were in fact false.

Logs and Logging—Sales of Timber—Rescission of Contract—Evidence.

6. In a suit to set aside a sale of timber for fraud, evidence *held* insufficient to show that defendants promised the other contracting party a quarter interest in a corporation to be formed.

Appeal and Error—Review—Scope and Extent—Misjoinder of Causes.

7. Where no demurrer for misjoinder of causes was interposed, and a motion to compel plaintiff to elect between causes was withdrawn or overruled by consent, the Supreme Court will, notwithstanding the contention that a cause of action for rescission and one to set aside a declaration of forfeiture cannot be joined, consider both causes on the merits.

Contracts—Construction—Forfeiture.

8. Courts are reluctant to enforce a forfeiture, and no language will be construed to work one where a contrary intent can be derived from a consideration of the whole instrument or from the circumstances attending its execution.

Contracts—"Forfeiture"—"Penalty"—Distinction.

9. In contracts and in civil matters generally the term "penalty" imports a clause by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract; while "forfeiture" is a broader term, including not only the payment of money, but the loss of property or of some right by reason of failure or neglect of a party to perform a contract.

Logs and Logging—Contracts—Forfeiture—Enforcement.

10. Where a contract relating to timber provides that in case of default by one of the parties his property and interest in the contract shall forthwith become the property of defendants who hold the legal title to the land, if the language of the agreement shows an intent of the parties to prescribe a forfeiture, and there has been a default, unless it is occasioned by the inequitable conduct of the defendants, the forfeiture must be enforced.

Contracts—Performance—Forfeiture for Breach.

11. Declaring a forfeiture for breach of conditions of a contract is not a rescission of the contract, but the assertion of a right growing out of it.

ON REHEARING.

Appeal and Error—Harmless Error—Ruling on Demurrer.

12. Error in overruling a demurrer for misjoinder of causes was harmless; the case having proceeded as a suit on one of them only.

NOTE.—Mandate recalled and corrected September 19, 1917, so that neither party recover costs. REPORTER.

From Multnomah: JOHN P. KAVANAUGH, Judge.

In Banc. Statement by MR. JUSTICE MCBRIDE.

This is a suit to rescind a contract for the sale of timber, situated in the State of Washington, on the ground of fraudulent representations as to the quantity of such timber and other alleged false representations materially affecting the contract. The pleadings independent of the exhibits would occupy 130 pages of the Oregon Reports, and the testimony taken on the trial contains over 3,000 pages of typewritten legal cap. The following excerpt from the opinion of the learned circuit judge who tried the case below indicates in a condensed form the various transactions between the parties up to the time this suit was begun:

"For some time before January 27, 1913, E. H. Dodge, Percy Allen, Fred A. Kribs, W. N. Jones, and F. A. Brewer, conferred and negotiated concerning the bonding of timber interests in Skamania County, Washington, and the logging and manufacture of timber. Fred A. Kribs was interested with the Pillsburys of Minnesota, in a large tract of timber in that section. The Pillsburys owned a three-quarter interest, and Kribs a quarter interest therein. W. N. Jones had a small tract of timber in that locality, and E. H. Dodge was the owner of a considerable tract of timber adjacent to the Pillsbury and Kribs tract. F. A. Brewer was a broker of Chicago, and was engaged in promoting the bonding of timber lands. As a result of those negotiations it was agreed that the timber lands owned by F. A. Kribs and Pillsburys, E. H. Dodge, and W. N. Jones should be transferred to a holding company and bonded in the sum of $900,000, and under an agreement

for the logging and manufacture of the timber Kribs and Jones organized and incorporated a holding company known as the J. K. Lumber Company, and on January 27, 1913, the said J. K. Lumber Company, the Hamilton Creek Timber Company, the Rainier Lumber & Shingle Company, and E. H. Dodge entered into a contract in writing to effectuate this enterprise. By this contract it was agreed, among other things, that the J. K. Lumber Company had or would acquire title to about 8,000 acres of timber land in townships 2 and 3 north, range 7 east, in Skamania County, Washington, on which there was 441,609,000 feet of timber; and that it would use its best endeavors forthwith to acquire title to approximately 75,000,000 feet of additional timber in township 3 north 7 east, in said county, that might be agreed upon by the parties to the contract. It was further agreed that it would mortgage the property covered by the contract as security for an issue of bonds in the sum of $900,000. Said holding company agreed that it would use and apply out of the proceeds of said bonds such sums as might be necessary, not exceeding $215,000, to construct two railroads, one up Hamilton Creek to about the center of section 36, the other up Rock Creek about two miles from a connection with the S. P. & S. railroad; to construct and equip a sawmill on section 35, with an annual capacity of 20,000,000 feet of lumber; to purchase railroad equipment for both roads, and to construct and equip logging camps sufficient to handle 300,000 feet of logs per day. The construction and equipment on Hamilton Creek were to be completed within six months after the fund of $215,000 was available, and the construction and equipment on Rock Creek were to be completed within one year after the completion of the construction on Hamilton Creek. Said holding company agreed to pay over moneys from time to time as they should be needed for construction and equipment, out of the proceeds of the sale of the said bonds, upon receipt of bills therefor and certified accounts of expenditures verified and certified to be correct by the president or treasurer of the Rainier Lumber & Shingle Company. Dodge and his

corporations agreed to repay to the holding company the difference between $155,000, the price paid for the Dodge timber, and the amount actually expended as above provided, in ten equal annual payments, with interest at six per cent per annum. The holding company agreed to sell, and Dodge and his corporations to buy, 658,895,000 feet of timber located on the land then owned or to be acquired by the holding company, at the total agreed price of $1,383,679.50, with interest from January 1, 1913, at the price of $2.10 per thousand for the year 1913, and increasing 6 per cent each year thereafter. The payments were to be made to the trustees under the trust deed until the bonds were paid, and thereafter to the holding company. Dodge and his corporations agreed to cut not less than 50,000,000 feet during each calendar year, or failing in this to pay to the amount of 50,000,000 feet. Dodge and his corporations agreed that any money derived from the logging and manufacturing of timber after the stumpage price had been paid, should be used: (1) To provide a working capital; (2) for the extension of logging roads and purchase of equipment, together with other equipment to replace such as would be worn out or destroyed; (3) to make annual payments on the difference in the cost of construction aforesaid, and the price paid by the holding company for the 93,400,000 feet of timber purchased from Dodge; and (4) that the money should be paid in advance, to the holding company to be applied by said company in the redemption and retirement of the bonds; and it was agreed that all profits derived from the operation of said timber should be devoted to said purpose, and that no money derived from the logging and manufacturing of said timber should be used for any other purpose. A checking and settlement was to be made on the 15th day of December of each year. Dodge and his corporations agreed that so far as practicable they would first cut the burned timber on Rock Creek in preference to the green timber, and they agreed that in the event of their failure to fully comply with all the terms, conditions, and provisions of said agreement, the mill property of the Rainier Lumber & Shingle Company, at Rainier, Oregon, the mill situated

on said section 35, and all of the railroad equipment, sawmill and logging equipment purchased for the logging of said timber, either with funds of the holding company, or with funds of Dodge and his corporations, should forthwith become the property of the holding company, and might be used by it for the logging and manufacture of the said timber or any other timber; and they agreed forthwith in case of such default to transfer and convey all of such mill property by good and sufficient deeds of conveyance, and thereby authorized the holding company, in case of such default, to take possession of said mill property and equipment and use and employ the same. Both parties to said agreement agreed to guarantee each of the bonds to be issued, and to endorse such guarantee on each bond. On the same day, January 27, 1913, a supplemental agreement was executed for the purpose of more clearly defining the rights and obligations of the parties to the original agreement; but it will be unnecessary to consider the provisions of this later agreement at this point. And on the 26th day of March, 1913, the parties entered into another agreement modifying section 12 of the original agreement in certain particulars not essential to the present consideration. On October 3, 1913, an agreement was closed between the parties whereby Dodge and his corporations in consideration of obtaining the signature of Fred A. Kribs and W. N. Jones to their note for $50,000, assigned to the said Kribs and Jones as collateral security 710 shares of the capital stock of the E. H. Dodge Lumber Company, and agreed upon reasonable demand to confer upon said Kribs and Jones the voting power of said stock, and also the voting power of the stock constituting a controlling interest in the Hamilton Creek Timber Company, the Rainier Lumber & Shingle Company, and the Patterson Lumber Company. And they also conveyed to said Kribs and Jones as collateral security their interest in said original and collateral contracts dated January 27, 1913. This agreement contained other conditions and provisions to secure said Kribs and Jones for extending their credit to the second parties. On

February 28, 1914, the holding company served upon Dodge and his corporations a written notice of forfeiture, asserting that they had made default in certain essential features of their contract particularly enumerated and designated in the notice; and notified them that said holding company elected to treat said contract as violated in certain fundamental features, and further notified them than unless they made payment of $6,000 and interest within thirty days from the date of the notice, and within said period proceed to carry out the other provisions of the contract concerning which they were in default, by entering upon and pushing to completion the Hamilton Creek railroad, and by completing the Rock Creek railroad by January 1, 1915, and by entering upon said logging operations as required by said contract, it would treat their rights under the contract as forfeited. And on the 12th day of May, 1914, the holding company executed a formal written declaration of forfeiture which contained an option available until January 1, 1915, to set aside said forfeiture and reinstate said contract upon furnishing said company with satisfactory evidence of financial responsibility to carry out said contract in strict accordance with its terms. Pursuant to this declaration of forfeiture the holding company took over the interest of the second parties and is now operating the logging business on its own account. When the forfeiture was declared the railroad up Hamilton Creek was completed for a distance of more than six miles. The construction of the Rock Creek railroad and the sawmill on section 35 was not begun. The sum of $215,000 provided by the contract for these purposes had been paid over to Dodge and his corporations, but logging operations had not begun."

The material allegations upon which plaintiff bases his claim for relief herein may be briefly summarized as follows: There is first a showing that plaintiff Stennick is the trustee in bankruptcy of the E. H. Dodge Lumber Company, the Hamilton Creek Timber Company, the Hamilton Creek Railroad Company, and of

E. H. Dodge; that the three corporations mentioned were organized under the laws of the State of Washington; that the J. K. Lumber Company is an Oregon corporation; that Kribs and Jones are large stockholders therein, Kribs being president and Jones treasurer, and that these two organized and own and control the corporation; that in 1912 Dodge owned a tract of timber land in Skamania County, Washington, upon which was 93,400,000 feet of standing timber, for which Dodge had paid $155,000, and which was worth $250,000; that in 1912 Kribs and Jones owned or were in process of acquiring a tract of between 8,000 and 9,000 acres of land adjacent to the land of Dodge. Then follows an allegation that in 1912 Jones and Kribs conspired in a fraudulent plan to take Dodge's land away from him by a fraudulent contract; the alleged fraudulent conspiracy being that they would by means of such contract induce Dodge to build a logging road to cost several hundred thousand dollars into the timber land owned by them, said contract to contain a forfeiture clause rendering it possible for Kribs and Jones to forfeit and take over said railroad at any time there should be a default in the essential conditions of said contract, which conditions could never be performed because of a shortage of the timber on the Jones and Kribs land below the amount represented by them as an inducement to Dodge to enter into the contract. After fully setting forth the nature and extent of the conspiracy the complaint charges the following alleged false representations: that Jones and Kribs would give Dodge and his corporation a quarter interest in a holding corporation which they proposed to organize; that they falsely represented and warranted that all the timber land would be included in the holdings of the new corporation, including Dodge's holdings and 75,000,000

feet which Kribs and Jones agreed to use their best efforts to acquire, and that Kribs and Jones' holdings contained a total stumpage of 658,895,000 feet, which amount they agreed to sell to Dodge and his corporation for the sum of $1,383,679.50, knowing at the time that there was a shortage in said timber of from 20 to 50 per cent below the quantity represented and warranted; that in order to facilitate the fraud and to successfully sell bonds to be issued in the sum of $900,000 Kribs and Jones made use of false cruises estimated prior to the time of the contract which grossly exaggerated the quantity of timber upon said lands and which represented the total amount of stumpage to be 658,895,000 feet, whereas they well knew that the amount of timber actually on said land was from 20 to 50 per cent less than the amount represented; that after these representations had been made, and Dodge had thereby been fraudulently inveigled into the scheme, a contract was entered into between a corporation which had been formed by Kribs and Jones and called the J. K. Lumber Company and Dodge and his corporations, which contract is annexed to the complaint, a brief synopsis thereof being contained in the excerpt from the opinion of the circuit judge above quoted; that the contract provided, among other things, that the sum of $215,000 arising from the sale of bonds should be turned over to the Dodge interests on or before May 1, 1913, to be used in building and equipping the road, but that no money was actually turned over until June 24, 1913, and that the Dodge interests having in reliance upon the contract begun work on April 1, 1913, found it necessary to advance $40,000 in order to carry on the construction of the road, and that owing to the delay of defendants in furnishing the money in accordance with the contract the work was greatly hin-

dered and carried over into a more inclement season of the year, and that when the defendants began to furnish money, it was not furnished promptly, thereby greatly retarding and delaying the Dodge interests in the work of construction, whereas if the $215,000 had been furnished on May 1, 1915, the road could have been commenced and completed before the winter season had commenced at much less costs, and that thereby the cost of building said road was increased to $370,464.31. There are other allegations of fraud and failure of defendants to perform their agreements, but it is impracticable to state them in full in this opinion.

There is another cause of suit stated which, in effect, reiterates the charge of conspiracy, false representations, breach of warranty, and proceeds upon the theory that defendants have themselves breached the contract and destroyed it by failure to perform their part. The further and separate cause of suit repeats all the charges of conspiracy and false representations contained in the first cause of suit, recites the bankruptcy of Dodge and his corporations, states that the only asset of value in the hands of plaintiff is the Rainier lumber mill, worth from $40,000 to $50,000, alleges liabilities on the part of Dodge and his corporations amounting to about $500,000, and declares that they were solvent when the contract with defendants was entered into, that the corporate property was then worth $250,000, and that the value of their assets was correspondingly diminished by entering into the contract in question; that in attempting to build the railroad and in purchasing logs for their mill during the summer of 1913, and while in good faith attempting to carry out the contract with defendants E. H. Dodge and his corporations became so involved that they were petitioned into bankruptcy; that the contract with de-

fendants contained a forfeiture clause providing that upon a failure of the Dodge interests and the Hamilton Creek Timber Company to conform to the contract made with the defendants the defendants could forfeit the right of the Dodge interests in the Rainier Lumber & Shingle Company and in the railroad equipment, sawmill, and logging equipment in Skamania County; that early in 1914 the Dodge interests had constructed about 7 miles of railroad into the timber lands mentioned in said contract, that the value of said railroad equipment amounted to $374,461.31, and that the defendants, disregarding their own fraud in inveigling the Dodge interests into the contract, ignoring the fact that they had so misstated the quantity of timber growing upon the land described in the contract to such an extent as to make it impossible for the Dodge interests to comply therewith, and had delayed the construction of the road, and realizing that the Dodge interests must inevitably go into bankruptcy, and in order to give their fraud a color of legal right and thereby convert said property to their own use, in fraud of other creditors, sent a notice, dated February 27, 1914, to the effect that unless the Dodge interests carried out their contract with defendants, defendants would declare a forfeiture within 30 days. The complaint then recites that after sending said notice a meeting of the creditors of the bankrupts was called, and it was agreed between them and defendants that defendants would allow the original contract to be carried out by a committee composed of representatives of the creditors, of the defendants, and of the Dodge interests, and that a manager should be selected for that purpose after the Dodge interests should have secured the assent of 95 per cent of the creditors thereto; that thereupon Dodge in person carried out the agreement by securing the assent

of approximately 95 per cent of the creditors and the Dodge interests made the necessary financial arrangements to carry out said agreement, the said interests and the said creditors being wholly ignorant of the frauds and false representations practiced upon Dodge and his corporations by the defendants; that thereupon the Dodge interests contracted with Cox and Armstrong to begin logging operations, when the defendants disregarding their agreement declared a forfeiture and took possession of the property. It is further alleged that the forfeiture was illegal and void both on account of the fraudulent representations inducing the contract and because of the violation by defendants of the subsequent agreement with the Dodge interests and the creditors; that it was in fraud of creditors and merely a pretext to enable defendants to get all the assets of Dodge and his corporations in their own hands and to make it appear that they were justified in taking possession. In addition to the prayer in the first cause of suit there is an additional prayer that a trust be impressed upon the property for the benefit of all the creditors, and for general relief. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Thomas Mannix* and *Mr. E. E. Coovert.*

For respondents there was a brief over the names of *Messrs. Clark, Skulason & Clark, Mr. Guy C. H. Corliss* and *Mr. W. S. Nash,* with oral arguments by *Mr. Alfred E. Clark* and *Mr. Corliss.*

MR. JUSTICE MCBRIDE delivered the opinion of the court.

1. This suit has the distinction of containing the most extensive record in the matter of pleadings, testimony, and briefs of any case ever brought to this court. The

first cause of suit is for the rescission of the contract between Dodge and the defendants upon the ground of false representations by defendants whereby Dodge and his corporations were induced to enter into it. Conceding, without deciding, that the trustee in bankruptcy is authorized to bring a suit to set aside a contract on the ground of fraud, we will consider the question as to whether the allegations of fraud are borne out by the testimony. The principal misrepresentation complained of is that defendants falsely represented to Dodge that there was 658,895,000 feet of timber upon the land. No attempt was made by plaintiff upon the trial to establish the fact that there was any misrepresentation as to 48,886,000 feet contained in section 36, nor in the Dodge tract of 93,400,000 feet or in the land to be subsequently acquired, which is said to contain 75,000,000 feet. Confessedly all these figures are correct, and the controversy centers around the Kribs tract upon which the contract states there is 441,609,000 feet, and which the plaintiff claims actually contained something like 100,000,000 feet less. To make clear the exact situation at the time the contract was entered into it is necessary to recapitulate the circumstances and negotiations of the parties leading up to its execution. The pooling of the Dodge, Jones, and Kribs interests was first mooted late in the summer or early in the fall of 1912. At that time Dodge was the owner of a tract in Skamania County consisting of about 1,520 acres of timber land and tributary to Hamilton Creek as the route of which a logging railroad could be built to convey it to market. There was also school section 36 which Dodge had caused to be cruised and which he contemplated purchasing, being estimated by his cruisers to contain 48,886,000 feet. Jones and Kribs had adjoining these tracts and tributary to Rock

Creek as a means of access by a logging road 8,200 acres upon which their original cruises showed 441,-609,000 feet. Of the amount in the Kribs tract Jones had only a one-third interest in 260 acres, the rest of the land being owned by Kribs and his associates, but managed by Kribs individually. Dodge also owned two sawmills at Rainier, Oregon, which while going concerns do not appear to have been doing a profitable business.

The matter was discussed between the parties for some time and a tentative oral understanding arrived at, and pending the actual execution of the contract Dodge sent cruisers to examine and report upon the Kribs tract, who actually cruised more than three fourths of it before they were driven out by the winter snow. Dodge had their reports before he entered into the contract, and it is apparent that so far as the cruise had gone it was satisfactory and coincided so nearly with the estimates of Kribs' cruisers that he was content to accept it. Cox, one of his cruisers who had cruised 2,807 acres, was put upon the stand, and his testimony indicates a substantial coincidence between his cruises and the summary of all the cruises furnished Dodge by Kribs and Jones. Porden, the other cruiser, claimed that he had destroyed the notes to his cruise after furnishing a copy to Dodge, but that copy is not produced by plaintiff and the presumption follows that it would, if produced, have been unfavorable to plaintiff's contention. In the cruise made by Cox he testified that he kept the dead timber separate from the other because he considered estimates upon that class of timber were extremely uncertain and that the only reliable test was cutting it out, but that he did not include any dead timber in his estimates which he did not consider merchantable. There was a considerable

quantity of dead timber shown by the Cox cruise. Porden also testifies that the dead timber cruised by him was separately itemized, so that it may safely be assumed that as to the six thousand and odd acres cruised by Cox and Porden, Dodge was fairly well informed as to its quality and quantity, and that there was, in fact, no material variance in the quantity of timber shown in the cruise-book furnished him by Kribs and Jones from that found by Cox and Porden. So that as to the 6,247.9 acres cruised by Cox and Porden, Dodge must be presumed to have acted upon the independent examination made for him by these two cruisers and not from representations made by defendants. This leaves 1,953 acres uncruised by Dodge before he entered into the contract. It is true that Cox advised him that the cruise of the dead timber might vary from his estimate and run either a little above or a little below it, with a probability that it would run below, but one fact stands out in bold relief, and that is that he was informed that there was a quantity of dead timber upon the tract, and that its value was, to some extent, uncertain. In fact, any cruise except a tree cruise is of necessity a mere estimate as Dodge must have known. The custom in these cruises, and generally, is to go twice through each 40 acres of a quarter-section, carefully noting the size, height, and soundness and apparent merchantability of the timber perceivable along the line followed, and to assume from the data thus gathered the average quantity of timber upon the tract. This average is an estimate. The lumber contents of the trees examined and their soundness and quality are mere estimates which may exceed or fall short upon an actual test in cutting or by an examination of each tree upon the tract, which latter would have been impracticable under the circumstances. There was a cruise-book of the whole tract

containing a summary of several cruises theretofore made by Kribs' cruisers which was given to Dodge before the contract was executed. From these cruises was derived the estimate of 441,000,000 feet which was placed in the contract. Both the defendants and Dodge knew that these cruises were merely estimates, and the testimony does not in our opinion disclose that there was any intention on the part of the defendants to place an extravagant estimate upon the amount of timber included in the contract. The plan was to transfer all the timber to the J. K. Lumber Company as a holding corporation, which should bond it for $900,000, which bonds Jones, Kribs, and Dodge were to underwrite. It was to the interest of all parties that every foot of merchantable timber on all of the tracts of Kribs and Jones and Dodge should appear in the contract as a basis for the proposed bond issue, and it was not to the ultimate advantage of any of the parties indorsing the proposed bonds that any extravagant or misleading estimate should appear therein. The safety of the indorsers lay in making the proposed project a success as a whole, and we are of the opinion that whatever the future cutting of the timber may disclose, Jones and Kribs were honestly of the opinion that the Kribs tract actually contained 441,000,000 feet of timber, and that their cruises justified them in this belief. Dodge testifies that Jones orally guaranteed in the presence of another person that there was 441,000,000 feet on the tract. This is denied by Jones, and the person in whose presence the alleged guaranty was made was not called as a witness; but, conceding that Dodge's statement is correct, it does not seem probable that Jones, who seems to be pecuniarily responsible, would have made a guaranty of this character in the presence of Percy Allen, an employee of Dodge, unless he be-

lieved the facts justified him in making it. The alleged guaranty appears in any event to have been merely a guaranty that the cruise of Jones and Kribs showed 441,000,000 feet. The whole conversation is thus detailed by Dodge:

"A. After seeing Mr. Cox, I went over and called up Mr. Jones and told Mr. Jones Mr. Cox had to come in for the reason that the snow shut him off and he could not cruise the timber; and that he advised me that I had better wait until spring to have the timber recruised.

"Q. What else took place at this time?

"A. And Mr. Jones said he could not wait until spring to have this timber cruised; that if we were to go ahead on this bond issue we had to go ahead now. I told Mr. Jones I did not want to go ahead under this proposition unless I had this timber cruised. He said, 'Well, I think we have some cruisers in our office, and I will go over those cruises,' and he came back and said he had figured up, I think—of course, in a day or two, and said they had four hundred and forty-one million feet up in that timber. I said, 'Well, I don't want to go ahead and sign this contract just on account of you saying you have four hundred and forty-one million feet of timber on those cruises there; I want some kind of a guaranty,' and Mr. Jones said, 'Well, we will have to go ahead with the contract or not, one or the other, and I have gone all over this cruise and checked them up, and there is four hundred and forty-one million feet there,' and I said, 'Do you say there is four hundred and forty-one million feet?' He says, 'I guarantee there is four hundred and forty-one million feet of merchantable timber up there on our cruise,' and consequently he put it into the contract and I signed it."

Dodge knew that Jones and Kribs had no other means of knowledge than their cruises which had been furnished him, and if Jones said, as claimed, "I guarantee there is four hundred and forty-one million feet of merchantable timber up there on our cruise," it could

be reasonably construed as signifying "according to our cruise."

2. So far as this branch of the case is concerned we do not find sufficient evidence to justify us in saying that the quantity of timber was intentionally misrepresented, nor does the fact that the substance of the alleged representation was written into the contract add to its efficacy or make it fraudulent. If Jones induced Dodge to execute the contract by falsely and fraudulently representing to him either orally or in the writing that there was one hundred million feet more timber on the tract than actually existed, then a rescission should be granted, or, if he recklessly made such a representation without knowing whether it was true or false, or without reason for believing it to be true, and it afterwards turned out to be false, a rescission should be granted provided the other elements necessary to a rescission are shown, not upon the ground of a breach of a written warranty, but because such alleged warranty also constituted a false and fraudulent representation inducing the contract.

3. Where it is sought to set aside a contract on the ground of fraud, the evidence should be clear and satisfactory; it being a maxim of law that fraud is never presumed: *Shebley* v. *Quatman,* 66 Or. 441 (134 Pac. 68); *Coffey* v. *Scott,* 66 Or. 465 (135 Pac. 85).

4. In order to have a rescission in this case plaintiff must show: (1) That defendants made a material representation; (2) that it was false; (3) that when defendants made it, they either knew it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that it was made with the intent that it should be acted upon by Dodge; (5) that he acted in reliance upon it; (6) that he thereby suffered injury. If any one of these requisites is

not established by a clear preponderance of the evidence, plaintiff cannot recover; and as before shown the evidence is insufficient in many particulars. There are no such allegations in the complaint as would authorize the court to rescind the contract on account of a mistake mutual or otherwise, nor is there such a condition shown by the testimony as to authorize the court to say that the defendants acted so recklessly that the representations were so grossly inaccurate as to amount to constructive fraud, and that, therefore, the contract should be rescinded. The case is based upon allegations of actual and intentional fraudulent representations, such as would support an action of deceit.

5. Again, conceding that defendant Jones made every representation and guaranty that Dodge claims, it is not sufficiently proved that such representations are false. Taking the testimony as a whole it appears quite as probable that there was 441,000,000 feet of merchantable timber upon the Kribs tract in 1912, when this contract was signed, as there was a smaller quantity. It does not follow that because fire had run through a portion of the tract and scorched and killed the timber all such timber was rendered valueless. The fire had occurred in 1902 and Kribs had purchased after that date up to 1906 various tracts, amounting in the aggregate to the 8,200 acres mentioned in the contract with Dodge. All the cruises made by him for the purpose of purchasing taken together indicate above 441,000,000 feet of merchantable timber upon the land, not necessarily green timber, but such as could be cut into lumber or otherwise made available on the market. A significant fact is found in the report of Captain Hill, who cruised a large portion of this tract in the interests of Mr. Elliott, who had an option on something over 6,000 acres of this tract; a portion of said report reading:

"On this tract there are fifty million feet of burned timber, and from trees examined in different parts of the burned area we found that the timber is still sound and in marketable condition, *and the condition indicates that it will be sound and marketable for from six to eight years from the date of this examination.*"

This opinion, given a little more than three years before the date of the contract in suit and by a disinterested expert acting for a prospective buyer, is entitled to weight and tends to show that the dead timber was, in fact, a value when the contract was made. We have carefully gone over all the cruises in evidence which were made before the contract was entered into, and assuming that they are fair and honest cruises made for the purpose of ascertaining the actual quantity of merchantable timber on the land we are of the opinion that there was upon the land at the time the contract was entered into substantially the quantity of merchantable timber represented. The Cox cruises made for Dodge before the contract was entered into and which are entitled to credit are a shade higher upon an average than the Kribs cruises, and the cruises made after this suit was in contemplation were so hasty and superficial in character, and are so at variance with other cruises made by men apparently reliable, we are not inclined to accept them. A few instances will suffice to show the wide difference between the cruises made before and after this action commenced; SE. ¼, Sec. 11, Tp. 37 E. Lacey & Co., cruiser for Brewer & Co., the bankers who were negotiating the prospective bond issue, reported 5,800,000 feet; Kribs' cruise, 5,200,000 feet; Cox, Dodge's cruiser, 6,820,000 feet; and McDonald, cruiser for plaintiff, 1,000,000 feet. On a tract in section 12, in the same township, Lacey estimated 13,654,000 feet; Kribs' cruise, 12,250,000 feet, Cox, 19,699,000 feet; and McDonald, only 4,400,000 feet.

On a quarter-section in section 13, in the same township, Lacey estimated 6,150,000 feet; Kribs' cruise, 5,850,000; Cox, 8,378,000 feet, and McDonald, only 1,200,000 feet. On another tract Lacey estimated 21,858,000 feet; Kribs' cruise, 22,210,000 feet; Cox, 22,687,000 feet; and McDonald, 6,900,000 feet. These differences run all through the cruises and differ so widely from the results obtained by other cruisers who had previously examined the tract that we cannot accept the McDonald cruise as fair in any particular. The testimony of J. S. McGinnis, offered by plaintiff to discredit the Kribs' cruise, is equally out of accord with all previous cruises. Thus upon Sec. 19, Tp. 3 R. 7 E., where Lacey & Co. estimated 18,364,000 feet, the Kribs' cruise, 22,210,000 feet, and Cox, 22,687,000 feet he estimates only 6,100,000 feet; in section 22, where Lacey & Co. estimate 46,697,000 feet, the Kribs' cruise, 54,970,000 feet, and Cox, cruising for Dodge, 56,551,000 feet, he gives only 27,700,000 feet; on section 30, where Lacey & Co. found 12,295,000 feet, the Kribs' cruise, 12,355,000 feet, Grady, a cruiser for plaintiff, 10,225,000 feet, and Cox, cruiser for Dodge, 18,224,000 feet, he found only 4,930,000 feet. His estimates are so grossly at variance with all the other cruises made, not only for the Kribs' interests, but for the Brewer, Dodge, and plaintiff interests, that they cannot be relied upon. His testimony indicates either a very imperfect knowledge of cruising, or a very careless, slipshod method of putting what knowledge he had into practice. He claims to have cruised eight forty-acre tracts in one day, and asserts that three quarter-sections can be cruised in one day, which everyone familiar with cruising knows to be an impossibility, and is so shown by the testimony. A number of gentlemen more or less familiar with the lumbering business took a cursory

view of the tract, but their examination was confined to walking across a portion of it and was too superficial to give any weight to their testimony. The plaintiff has succeeded in showing that there was a large quantity of dead timber on the land, that the various cruises included a portion of this as merchantable, and that it is subject to deterioration and decay, but has not in our judgment established the fact that any considerable quantity of the timber shown in the Kribs' cruises was unmerchantable at the time the contract was entered into, or that unmerchantable dead timber was included in the estimates which went to make up the 441,000,000 feet mentioned in the contract. It may be an overestimate, or it may not. Dodge knew that there was a considerable quantity of dead timber included in the estimates, and clause 8 of the contract contained this provision:

"The second parties further agree that so far as practicable they will first cut the burned timber on Rock Creek in preference to the green timber," etc.

This indicates that the matter of dead timber had been considered by the parties and that its quantity was deemed of sufficient importance to make it the subject of affirmative mention in the contract, which would hardly have been likely had it consisted of mere inconsiderable patches resulting from camp-fires. We do not believe that the contract was induced by any fraud or false representations on the part of defendants, and these charges appear to be an afterthought when for reasons that have affected the whole logging interests of the northwest the bright prospects for the future of that industry proved to be illusory. At the time this contract was entered into there was a steady demand for lumber in the east, which for reasons not easily understood suddenly ceased. There were

great expectations of profit to the industry from the opening of the Panama Canal, by means of which it was supposed that lumber could be sent to the east and Europe more expeditiously and at a reduced cost. It unfortunately happened that the canal was not opened for general commerce as soon as expected, and that when it did open an unexpected toll charge which would amount to $1,500 for every million feet of lumber passing through it was imposed. This alone would, if Dodge contemplated shipping the 50,000,000 feet he was to cut annually to the eastern market, reduce his annual profits by $75,000. Added to this the stringency in the money market which prevailed in 1913 and 1914 and the fact that his other lumbering operations were also affected, greatly in debt, and unprofitable, we find abundant reason for his failure to carry out his contract without imputing it to any sinister action on the part of defendants. In the light of circumstances as they appeared in 1913 the prospects of success for his venture seemed fair and his contract a good business proposition. As events actually turned out he was wrecked as many another good business man was from the same causes. In fact, he does not impute his bankruptcy to the shortage of timber, which he claims was not then discovered, but to other causes. In his testimony before the referee in the bankrupt proceedings Dodge admitted that he did not have enough liquid assets to offset his indebtedness, and that he was practically insolvent, and stated that his principal assets were the Rainier mill and the contract with the J. K. Lumber Company. Referring to the contract in suit he testified:

"I always considered it a good asset. * *

"Q. I mean if the timber market was good it would have been a good asset, and if the timber market was

the way it is at the present time it would have been a poor asset?

"A. Yes."

The summing up of the learned circuit judge who tried this cause below upon the question of false representations is so cogent that we quote a portion of it:

"It is contended that this and other statements relating to the quantity of timber were expressions of opinion or estimates, and not statements of fact; that the amount of merchantable timber on this 8,000 acre tract, situated as it is, was not susceptible of accurate knowledge, and that the utmost one could do, was to estimate the timber by means of cruises. It is clear that this quantity was ascertained for the purpose of the contract by computing the cruises contained in the cruise-book, marked plaintiff's exhibit DD. This is the same cruise-book that was delivered to Dodge before the contract was signed. It contains cruises by C. J. Clement, J. C. Murray, Charles Thom, Ben McMullen, A. J. Bennison, P. C. Garrison, C. W. Mead, and James D. Lacey & Co. All of these cruisers verified their cruises by affidavit, except C. W. Mead, whose affidavit could not then be procured, and Lacey & Co. It comprised cruises previously made and which were in the possession of Kribs. Jones says they were collected by Frank Garrison, a clerk in Kribs' office, at his direction, but without any suggestion as to the selection of any particular cruises. Clement's cruise was made about November, 1905; Murray's, about July 26, 1909; Thom's, about May 1, 1906; McMullen's, about May 1, 1906; Bennison's, about August 1, 1909; Garrison's, about February, 1912, and Mead's, in 1907. These are the cruises from which Jones computed the 441,000,000 feet on the Kribs tract. The cruise-book also included the cruises of J. F. Cox of the Dodge tract, section 36, and eight forties in section 31, duly verified under the cruise date of June 2, 1912. Now, was this body of timber capable of accurate ascertainment?

The land was broken and mountainous, and the evidence establishes beyond dispute that the only practical method of ascertaining the quantity of timber in a tract of this area and contour was by careful cruising by competent cruisers. I was impressed at the trial by the fact that accurate knowledge of the timber on this tract was impossible, and that owners and purchasers alike must depend upon the estimates of cruisers for their information. In cruising timber the human equation is always present, and the accuracy of the cruise depends upon the skill, the judgment, and the conscientious service of the cruiser. The extent to which the estimates of cruisers may vary is forcibly illustrated by the evidence in this suit. Under favorable and similar conditions, two cruisers of apparently equal ability will often vary greatly in their estimates. Representations should be considered in the light of existing conditions, and the physical facts should be kept in view, in construing this provision of the contract. And the situation and relative information of the parties should be considered. Both Jones and Dodge were familiar with timber cruising. Both had timber cruised before; it was part of their business. Dodge was the owner of timber adjacent to the Kribs tract which had been recently cruised. He had two other adjoining tracts cruised which he intended to buy. One of his business associates, and one of his employees, had taken a run through the Kribs tract. Two of his cruisers, Cox and Porden, had cruised over 6,000 acres of the Kribs 8,000 acre tract, and submitted a detailed report of their cruises, with a contour map which were available for inspection and comparison. He had the cruise-book in his possession upon which Jones' statement of quantity was based. So with these means of information, with these opportunities for comparison, and with the past experience in the timber and logging business, he entered into the contract. When the parties contracted concerning this timber their knowledge of the inaccuracy of timber cruising, and the practical impossibility of accurate knowledge of

the quantity of standing timber were present, existing facts, which cannot be excluded from their negotiations. They both knew that their estimates might vary; that the timber could not be expected to cut out in exact accordance with the estimates; that it might overrun or might shrink in the cut or scale. Dodge knew that Jones could not give him a definite statement of the Kribs timber, and Jones knew that Dodge could not give him a definite statement of the timber on the Dodge tract, on section 36, or on section 31. A reasonable margin of variance must have been within the contemplation of both parties. This cruise-book DD contained cruises procured by Kribs on his tract, and cruises procured by Dodge on his tract, and on the tracts he intended to purchase. These cruises were estimates only, but they formed the only basis on which negotiations could proceed. Jones evidently accepted Dodge's estimates, as shown by the cruise-book, on the three tracts in which Dodge was interested, and it is entirely reasonable to assume that Dodge accepted Jones' estimates on the Kribs tract, as shown by the cruise-book. Now these same cruise estimates, on the Kribs tract, on the Dodge tract, and on section 36, were taken and inserted in the contract. The Kribs tract was given as containing 441,609,000 feet, section 36 as containing 48,886,000 feet, and the Dodge tract as containing approximately 93,400,000 feet. These figures by that time must have become familiar to all of the contracting parties. Dodge says the cruise-book was delivered to him a couple of days before the contract was signed. I am inclined to think that his memory is at fault there. The testimony of Jones refutes this, and the circumstances attending the negotiations, point, in my opinion, to an earlier delivery. It appears that Brewer, the bonding broker, brought the parties together. Both evidently intended originally to secure separate and independent bond issues upon their properties. There were preliminary negotiations and conferences between the parties. Jones collected the cruises on the Kribs tract, Dodge collected those on his tracts, and all were bound together in the

cruise-book. Jones secured several copies and took one east on December 14, to deliver to Brewer, and says that he gave Dodge a copy before his departure. On December 12, Dodge sent J. F. Cox and Ben Porden up to the Kribs tract to cruise the timber. This was an independent investigation to determine the quantity of timber on the Kribs tract before the contract was signed. Cox cruised 2,807.9 acres, and Porden cruised 3,440 acres, aggregating 6,247.9 of the Kribs 8,000 tract, before they abandoned the cruise on account of the snow. Their cruise reports and a contour map were delivered to Dodge's office about January 10, which was about 16 days before the contract was signed. These cruises were available for comparison with the cruise-book. It is true Cox advised a recruise for the reason, as he says, that the cruise of the entire tract was not completed, and because they might have overlooked some defects on account of the snow. But he says that the cruise should not vary more than 5 per cent on account of weather conditions. Cox also cruised 920 acres of the Kribs tract in the fall of 1913, under ideal weather conditions. Cox was Dodge's cruiser, and the same man whose cruises of the Dodge tracts form a part of the cruise-book. If Cox's cruises were sufficient estimates of the Dodge timber as a basis for this contract, why were not his cruises on the Kribs tract useful and serviceable to Dodge in these negotiations? There is nothing in this record to impeach his honesty, or to detract from his capacity. Weather conditions might have affected his winter cruise to some extent. It is rather significant that the Cox cruises are generally higher on the same land than the Kribs cruises used in the cruise-book. Neither the Cox cruise, nor the Porden cruise was produced by the plaintiff, although they were both traced to Dodge's possession, and their absence was not explained to my satisfaction. The Cox cruise was available through original notes which Cox preserved, but the Porden cruise was not available, because Porden had lost or destroyed his original notes. But he identified the lands he had

cruised. Now with the Cox and Porden cruises in Dodge's possession about 16 or 17 days before the contract was signed, and with the Kribs cruises in his possession for at least a few days before it was signed, Dodge either compared the cruises and satisfied himself concerning the quantity of timber, or else he would appear to be lacking in reasonable prudence and diligence. I do not think they should have been ignored in this important transaction. Making due allowance for weather conditions, the cruise of more than three-fourths of the Kribs tract by Cox and Porden, should still have shown the run of timber on the tract. So I am persuaded from all the evidence, and the attending circumstances, that both parties contracted with the definite knowledge that the quantity of timber was not susceptible of accurate knowledge; that both parties knew that the quantities inserted in the contract were derived from a computation of cruises contained in the cruise-book; that neither had any source of information other than cruises; that their cruises were nothing more than estimates of cruisers, and that these statements of the quantity of timber were intended and understood by the contracting parties to express the estimates of the parties of the quantities of timber on the respective tracts; that, while the provision in question is positive in terms, it was based entirely upon estimates, and was only an estimate of that which was not susceptible of accurate knowledge, and was not intended, nor understood, to be a representation of a definite, ascertained quantity of timber."

6. Another alleged false representation is that the defendants for the purpose of inducing Dodge and his corporations to execute the contract promised that they would receive from Kribs and Jones a one-quarter interest in the corporation which they proposed to organize, which quarter interest would give Dodge and his corporations one quarter of the profits to be derived from such enterprise; that such promise was

fraudulently made with no intent to perform it, and that it was not performed. There was some discussion in the court below and in the briefs here as to whether failure to keep a promise to perform an act in the future and after the contract induced by it should have been fulfilled could be a ground for rescission; but passing by this question we are of the opinion that plaintiff has failed to prove that such promise was actually made. Dodge's testimony concerning the alleged promise is as follows:

"I says (to Jones), 'Well, I can see under this contract where I am going to get away.' He says, 'Well, what are you going to do about it?' I says, 'Well, I think I ought to have an interest in this proposition.' He says, 'What kind of an interest?' I says, 'Well, I think that I am entitled to some interest in the J. K. Lumber Company; I think I am entitled to a quarter interest for doing all this.' And Jones thought a while, didn't say anything, and I says, 'I think that is fair, that we should have that.' He says, 'Well, I will think the matter over and let you know.' So we held the thing off a little while, held this contract off, and he said, 'You fellows going to get busy with this thing?' And I said, 'I am waiting to hear from you.' So he came down and we went down to the Oregon Grill again. We sat down and had lunch, and he said, 'Well, to satisfy you if you will sign this agreement we will give you a quarter interest in the J. K. Lumber Company.' So I said—I think he said, I don't know whether it was exactly the J. K. Lumber Company or timber company to be formed, but I says, 'I will sign that agreement and the contract that way.' Then after we talked the proposition over I says, 'You pay the bills and I will have a quarter interest in the J. K. Lumber Company, if I cannot finance this thing and handle it that way.'"

Dodge also testified that at the preliminary talk with Jones on this subject Mr. Allen, a business asso-

ciate of his, was present. Allen testified that he had no recollection of such a conversation and Jones positively denied it. Kribs denied making any such promise, and this interest was not mentioned in Dodge's schedule in bankruptcy, nor did he at any time after the J. K. Lumber Company was organized demand of any of the defendants any portion of the stock. The alleged agreement is not shown by a preponderance of the testimony.

7. We will next consider the second cause of suit. It reiterates the charges of false representations contained in the first cause, and as to these nothing further need be added. They are out of the case. The complaint, however, goes farther and alleges facts apparently upon the theory that conceding the contract was fairly procured the defendants have so breached it that it would be inequitable to allow a forfeiture to stand. It was claimed by the defendants upon the argument that a cause of suit to rescind a contract upon the ground of fraud rendering it void could not be joined with a cause of suit to set aside a forfeiture prescribed in the same contract by reason of a breach in its provisions; the first being, in effect, a denial of the existence of a valid contract, and the second an affirmation of its existence; and this seems to be the general rule. However, in the case at bar no demurrer for misjoinder was interposed; the only demurrer filed being general as to each cause of suit. Later a motion to compel the plaintiff to elect was withdrawn or overruled by consent. In this state of the case we will consider the second cause of suit upon its merits as disclosed by the testimony. The situation as to the railroad was this: The J. K. Lumber Company had the legal title to the Dodge lands, and to the Jones and Kribs lands as well. The legal

title to the road, therefore, vested in the J. K. Lumber Company subject to be reconveyed to the Dodge interests upon the performance by them of their contract. That this was the intent of the parties as well as the legal effect of the conveyance to be executed by the Dodge interests is clearly shown by clause 6 of the contract, which is as follows:

"It is further agreed that when the second parties shall have repaid to the first party the amount advanced by the first party for the construction of logging railroads, mills, and equipment over and above the amount paid by the second parties for the timber conveyed by second parties to the first party, that such logging railroads, mills, and equipment shall thereupon belong to said parties of the second part, subject, however, to the faithful performance of all of the covenants and agreements herein made by the second parties and subject also to the lien of said trust deed insofar as it may cover such property."

The forfeiture clause in the contract is as follows:

"The second parties agree that in the event of their failure to fully comply with all of the terms, conditions, and provisions of this agreement, the mill property of the Rainier Lumber & Shingle Company, now located at Rainier, Oregon, and the mill situated in section 35, township 3 north, range 7 east, Skamania County, Washington, and all of the railroad equipment, sawmill and logging equipment purchased for the logging of the lands covered by this agreement, either with funds of the first party or with funds of the second parties, shall forthwith become the property of the first party and may be used by said first party for the logging and manufacture of the logs and lumber of the timber referred to in this agreement or any other timber, and the second parties forthwith agree in the event of such default to transfer and convey all of such mill property by good and sufficient deeds of conveyance, and in the event of such default of the second parties, the first party

is hereby authorized to take possession of such mill property and equipment and use and employ the same, and said second parties agree not to interfere with such possession and use of said property of said first party."

The land title itself being in the J. K. Lumber Company, the road built upon the land became a part of it, and a forfeiture of the land necessarily carried with it the roadbed, and it was only necessary to designate the equipment, which did not become part of the realty, to bring all the improvements under the forfeiture clause, and this was done. So that for a substantial breach of the conditions of the contract by the Dodge interests the J. K. Lumber Company, upon declaration of its intention to enforce the forfeiture, had a right to take possession of the property described therein, except the mill property at Rainier, which for reasons hereinafter shown could not be the subject of forfeiture, not being embraced in the property conveyed under the contract.

8–10. It is claimed that the alleged forfeiture clause is, in fact, a penalty, and not a forfeiture, and that for this reason the defendants had no right to seize the property. It is a familiar rule of law that courts will always be reluctant to enforce a forfeiture and no language will be construed to work one where a contrary intent can be derived from a consideration of the whole instrument or from the circumstances attending its execution: *Oregon R. & N. Co.* v. *McDonald,* 58 Or. 228 (122 Pac. 413, 32 L. R. A. (N. S.) 117, note). Now the words "forfeiture" and "penalty," while often used interchangeably, are not always synonymous, that is to say, a forfeiture is not always or necessarily a penalty. The principal distinction between the two is that in contracts and in civil mat-

ters generally the term "penalty" invariably imports a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in the same agreement: Bouvier Dict., tit. "Penalty"; *Tayloe* v. *Sandiford,* 20 U. S. (7 Wheat.) 13 (5 L. Ed. 384); *Watt's Exrs.* v. *Sheappard,* 2 Ala. 425; *State ex rel. Rhodes* v. *Warner,* 197 Mo. 650 (94 S. W. 962); *Huntington* v. *Attrill,* 146 U. S. 657 (36 L. Ed. 1123, 13 Sup. Ct. Rep. 224). A forfeiture, on the other hand, is a broader term and may include not only the payment of a sum of money but the loss of property or of some right in it by reason of failure or neglect of a party to perform a contract. Where a contract provides that a party shall forfeit a sum of money in case of failure to perform a contract, the courts, if such a construction seems reasonable in view of all the circumstances, will treat the stipulation as a penalty rather than as an agreement for liquidated damages (which would amount to a pure forfeiture of the whole sum stipulated), and will allow the promisee to recover only such amount as will cover his actual damages by reason of the breach.

"A forfeiture is a deprivation or destruction of a right in consequence of a nonperformance of some obligation or condition": *Webster* v. *Dwelling House Ins. Co.,* 53 Ohio St. 556 (42 N. E. 546, 53 Am. St. Rep. 658, 30 L. R. A. 719).

"The omission or neglect of a duty which a party binds himself to perform, or to the performance of which he is enjoined by law, is on a breach thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined": *Beard* v. *Beard,* 22 Ky. (6 T. B. Mon.) 430.

"Forfeiture is a divestiture of property without compensation in consequence of a default or offense":

Union Glass Co. v. *First National Bank,* 10 Pa. Co. Ct. Rep. 565.

"Forfeiture relates to something done or omitted by which one's rights are lost. There can be no forfeiture of a contract that has no existence. Forfeiture assumes a pre-existing valid contract or obligation": *Roblee* v. *Masonic Life Assn.,* 38 Misc. Rep. 481 (77 N. Y. Supp. 1098).

It will thus be seen that while the words "penalty" and "forfeiture" are frequently used interchangeably, and while often the legal effect of their use is the same, that such a construction in an instrument relating to the loss or destruction of a right under a contract is impossible. The reason is apparent. In a case where a person agrees to perform a certain act or to pay a certain sum of money the court under certain circumstances may be able to say that the sum agreed to be paid is so disproportionate to the injury suffered it will hold the stipulation to be a mere penalty intended only to cover any actual damages that may ensue from a breach, that is, if the sum to be forfeited were fixed at $500 and the actual damages were only $100, the court under some circumstances, not all by any means, might award the promisee $100; but in a case where the thing to be forfeited is a property right dependent upon the payment of purchase price or the performance of some condition, the court cannot say to the promisee:

"The contract provides that the right to 160 acres of land shall be forfeited, but you are damaged only to the extent of 80 acres. Therefore, we will apportion that quantity to you instead of the 160 acres mentioned in the contract."

The court must enforce the forfeiture as it finds it, or not at all. It has no leeway to substitute damages for the forfeiture mentioned in the contract. In

Seeck v. *Jakel,* 71 Or. 35 (141 Pac. 211, L. R. A. 1915A, 679), which was an action in ejectment brought for breach of a condition in a deed whereby the purchasers bound themselves not to carry on a particular business upon the granted premises, the defendants in their answer made the following tender:

"(The defendants) offer and tender to the plaintiffs any damage which the plaintiffs may have sustained by reason of a livery business being carried on on said premises by the defendants A. J. Newman and J. W. Newman, in case the court adjudges that the said provision against carrying on said business on said premises is a lawful provision." This court said: "We can only enforce the condition subsequent as we find it embodied in the deed. We find nothing in the pleadings or the testimony authorizing us to relieve the defendant, or to enlarge the estate which he knowingly and voluntarily purchased, encumbered as it was by the condition named."

So here, if we find from the language of the agreement that the intent of the parties was to prescribe a forfeiture as the result of noncompliance by the Dodge interests with the terms of the contract, it is our duty to ascertain the facts, and if our investigation discloses that there has been such failure to live up to its terms, we should, unless such failure has been occasioned by the inequitable conduct of the defendants, declare the legal results of such failure.

11. Again, declaring a forfeiture for breach of the conditions of a contract is not rescission of the contract. It puts an end to the contract and extinguishes it in pursuance to its terms just as performance extinguishes it. The act of taking possession under a forfeiture clause is not an act of rescission or in avoidance of the contract, but the assertion of a right growing out of it. A contracts with B thus:

"If I fail to do a certain act at a particular time, you may take to yourself the interest or right that I have in the property, the legal title of which is in you."

A fails to do the act, and B takes possession of the property. Here is, in fact, no rescission of the contract by A, but merely the exercise of a contract right. The forfeiture takes the place of performance.

To discuss the evidence in detail would consume more space in the reports than would be practicable. It is sufficient to say that it fully supports every charge of default made in the notice of forfeiture, and that the exigencies of the case were such that the defendants were forced to the alternative of either taking the property and trying to save something out of it or of allowing the interest on the $900,000 bond issue to default, and the property to be sold at a probable or, at least, possible sacrifice. The defendants being indorsers on the bonds were in a precarious position. The Dodge institutions and himself were practically insolvent and could raise no more money. They had fallen down on the contract and were unable to proceed further, and it is apparent that their creditors never agreed to and never would have agreed to take up the Dodge contract where he left off and complete it in the depressed condition that the lumber market then was, and still is. It is true that the creditors discussed the matter, but arrived at no favorable result, and the testimony of Mr. Stennick shows that they could have arrived at none. If present lumber conditions continue, it is evident that there will be no profit in logging the lands described in the contract that will more than suffice to pay the bonds and interest if every foot of timber claimed by the defendants to be upon the land is actually there.

Any profit is purely speculative and dependent upon a return of former favorable conditions. No unprejudiced person can read this testimony and not be impressed with the idea that defendants as a matter of self-interest were desirous that Dodge should succeed in carrying out his contract and that they performed their part of it and more, advancing money and loaning their credit to enable him to borrow and evincing in every way a desire to make the project a success. Whether he failed because of the prevailing depression in the lumber market or from mismanagement or through attempting to carry out a contract too large for his resources cannot alter the fact that his failure cannot be traced to any act of defendants.

Other interesting questions have been discussed in the briefs, but we have chosen rather to decide this case upon its merits than upon the technical matters presented. We have read and re-read the evidence presented in the 3,000 pages of transcript and given much attention to the elaborate briefs of counsel, and upon the whole are satisfied that the decree of the Circuit Court should be affirmed. AFFIRMED.

Modified and affirmed on rehearing July 31, mandate recalled and corrected as to costs September 19, 1917.

ON REHEARING.

(166 Pac. 951.)

Mr. Thomas Mannix and *Mr. E. E. Coovert,* for appellant.

Messrs. Clark, Skulason & Clark, Mr. Guy C. H. Corliss and *Mr. W. S. Nash,* for respondents.

In Banc. Opinion PER CURIAM.

12. The questions raised upon the hearing have necessitated a review and checking up of all the points touched upon in the original opinion. Relating to the first cause of suit we are in entire accord with the original opinion and with the opinion and decree of the court below. In relation to the second cause of suit it was erroneously assumed that the objection that there was a misjoinder of causes of suit was not well taken because there had been no demurrer interposed on that ground; Mr. Justice MCBRIDE who wrote the opinion saying:

"It was claimed by the defendants upon the argument that a cause of suit to rescind a contract upon the ground of fraud rendering it void could not be joined with a cause of suit to set aside a forfeiture prescribed in the same contract by reason of a breach in its provisions, the first being, in effect, a denial of the existence of a valid contract, and the second an affirmation of its existence; and this seems to be the general rule. However, in the case at bar no demurrer for misjoinder was interposed; the only demurrer filed being general as to each cause of suit. Later a motion to compel the plaintiff to elect was withdrawn or overruled by consent. In this state of the case we will consider the second cause of suit upon its merits as disclosed by the testimony": *Stennick* v. *J. K. Lumber Co., ante,* p. 473 (161 Pac. 97).

Upon a re-examination of the voluminous transcript we discover that a demurrer for misjoinder was filed and overruled on March 9, 1915. We are of the opinion that the objection was well taken and that the bill was clearly multifarious. While the court below overruled the demurrer, the opinion rendered as well as the final decree make it evident that it proceeded upon the theory that this was a suit for a rescission of the contract

upon the ground of fraud, and not otherwise. In addition to the learned opinion of the court below given upon the principal case, which only the lack of space prevents us from incorporating here, the Circuit Court upon a motion for re-examination of the case rendered the following additional opinion, which we give in full:

"Since the decision was rendered the plaintiff has presented a motion for a decision that will fully determine and adjust the equities in this suit. The motion and argument were addressed mainly to the forfeiture which was declared under the provisions of the contract. I concluded early in this litigation that this was not a suit to be relieved from a forfeiture, but that it was a suit to rescind the contract for fraud inducing its execution. In that view I could only consider those negotiations which were had before, or at the time of execution, since proceedings taken after execution could not have induced the contract. It appeared plain that a suit to rescind and a suit to be relieved from a forfeiture could not be maintained together, because they are inconsistent remedies; one in repudiation and the other in affirmance of the contract; that if both remedies were pursued together the bill would be multifarious and vulnerable to the demurrer. So this demurrer was overruled upon the assumption that one cause of suit was stated, and that a suit to rescind. These remedies being inconsistent, the adoption of the one was the exclusion of the other. The entire theory of the case as indicated by the pleadings, the evidence, and the arguments was the rescission of the contract for false representations of the quantity of timber. Fraud was the controlling issue, and the disposition of that issue was decisive of the case. I did not regard the averments relating to the forfeiture as raising a distinct or vital issue, nor one having a direct bearing upon the issue of fraud, but merely as disclosing the later contractual relations of the parties, and important only to advise the court of the existing situation in case a rescission was decreed. But, aside from the question of con-

sistency, I could not relieve against the forfeiture, because the conditions do not exist upon which that relief could be granted. There is neither a disposition nor apparent ability to perform the obligations of the contract if the forfeiture were removed. This remedy presupposes an intention and ability to perform, and is usually provided by an interlocutory decree, extending the time of performance and suspending the forfeiture during that period. I take it to be elementary that such relief cannot be granted at the suit of a party who declines to perform his part of the contract, and who disclaims in advance any intention to comply with its provisions. I am unable to follow counsel for plaintiff in his contention that the forfeiture should be removed, and the *status quo* restored, or its equivalent attained by a decree for money. This would involve not only relief against the forfeiture, but also a rescission of the contract on account of the forfeiture. I have given this cause diligent and conscientious service. Every contention of the plaintiff has been considered, and in this I have never been unmindful of the unfortunate situation in which the bankrupts have been placed. But I must decide this suit upon the law and the evidence. I am firmly convinced that fraud was not established, and this failing the present suit must fail. Any other available remedy the plaintiff may have will not be prejudiced by the decree. For the rest, the appellate court will correct any unconscious errors that I have made."

There was a practical election on the part of counsel to try the case as one for the rescission of a contract upon the ground of fraud. At the beginning of the trial in answer to a remark of the court counsel for defendants replied:

"Certainly we are not proceeding on any theory of affirming this contract; we are proceeding upon the theory of disaffirming it, and we claim the right to introduce evidence—

"The Court: The inquiry you desire to make in the question of warranty is in so far as that constitutes misrepresentation?

"Counsel for Defendants: Absolutely."

So it appears that the whole case was tried out upon the theory that if there were no fraudulent misrepresentation and no breach of the contract by the defendants, there was no right to recover in this suit. The subsidiary questions raised in plaintiff's alleged second cause of suit, and again urged here, were properly considered as not involved in that issue as they were pleaded and could only be pleaded upon the theory that there was a valid and subsisting contract, whereas the suit for rescission was in disaffirmance of the original agreement upon the theory that it was invalid. What is said, therefore, in the original opinion upon those matters relating peculiarly to the alleged second cause of suit may be regarded as *dictum*.

It is urged that certain property taken possession of by the defendants upon the forfeiture is shown by the evidence to belong to the Yule Logging Company and not to the Dodge interests; but for the reason above stated, as well as for the additional reason that that company is not a party to this suit and has been and is yet at liberty to litigate its own property rights with defendants, we are not authorized to consider that phase of the case.

As explained and modified herein we adhere to our original opinion, and the decree of the Circuit Court is affirmed as rendered.

OPINION MODIFIED AND ADHERED TO.
NO COSTS ALLOWED EITHER PARTY.

Argued July 10, modified September 19, 1917.

COLBY *v.* CITY OF MEDFORD.*

(167 Pac. 487.)

Statutes—Enacting Clauses—Constitutional Law.

1. Under the Constitution of Oregon (Article IV, Section 1), declaring that "the style of all bills shall be" of a prescribed form, a statute must contain an enacting clause.

Municipal Corporations—Ordinances—Passage—Form.

2. A substantial compliance with a charter requirement as to the form of ordinances is sufficient.

Municipal Corporations—Ordinances—Charter Amendments—Form—Constitutional Law—Enacting Clauses.

3. Article IV, Section 1, of the Constitution, declaring that "the style of all bills shall be: 'Be it enacted by the people of the state,' etc.," does not apply to municipal ordinances or charter amendments initiated and adopted by the legal voters of a city.

Municipal Corporations—Charters—General and Special Acts—Ordinances—Form.

4. Section 3224, L. O. L., relating to forms of ordinances, being one of the sections of a general incorporation act, does not apply to a city incorporated under a special act.

Municipal Corporations—"Ordinances"—Charters—Amendments—Enacting Clauses.

5. A section of a charter, providing that all "ordinances" shall contain an enacting clause, which was in the charter before the iniative power to amend the charter was given to the voters of a city, does not apply to amendments to the charter.

Municipal Corporations—Charter Amendments—"All Measures."

6. The term "all measures," in a section of a city ordinance requiring enacting clauses, *held* to apply to amendments to the charter, whether initiated by the people or submitted by the council.

Municipal Corporations—Initiative and Referendum—Elections—Enacting Clause.

7. Where an ordinance requiring an enacting clause to charter amendments was in effect at the time of the initiative petition, indorsement by the council, and publication of a proposed charter amendment, but such ordinance was amended the day before the election,

*On necessity of statute containing enacting clause, see note in **L. R. A.** 1915B, 1060.

On the question of power to impose special assessments by front foot rule, see note in 28 **L. R. A. (N. S.)** 1124.

On assessment of corner lot for public improvements at intersection of street, generally, see note in 50 **L. R. A. (N. S.)** 922, 928.

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making an enacting clause unnecessary, the charter amendment was legally adopted, though it contained no enacting clause; the election being the vitalizing act, and all going before being mere formality and preparation.

[As to construction of initiative or referendum provision in Constitution, statute or municipal charter, see note in Ann. Cas. 1916B, 819.]

Municipal Corporations—Ordinance—Passage—Enacting Clause.

8. In the absence of an ordinance, statute or Constitution prescribing it, an enacting clause is not necessary in the passage of an ordinance.

Municipal Corporations—Initiative and Referendum—Procedure—Constitutional and Legislative Acts.

9. Section 3482, L. O. L., providing that 90 days elapse between petition and election on an initiative measure, has no application to towns or cities that have prescribed their own procedure, under Article IV, Section 1a, of the Constitution, empowering a city or town to provide its own method, and an ordinance requiring but 30 days is valid.

Municipal Corporations—Initiative and Referendum—Ordinances—Procedure.

10. Where a city ordinance provided that the council, if it disapproved an initiative proposed amendment to the charter, could propose a competing amendment to submit at the same election, the voters could also submit such an amendment, though nothing was said about the voters submitting a competing amendment.

Municipal Corporations—Initiative and Referendum—"Proposed by the Council"—"Proposed by Initiative Petition."

11. Although a city council caused a certain measure to be prepared, but the legal voters petitioned for the measure, the measure was "proposed by initiative petition," and not "proposed by the council," within the meaning of an ordinance providing that such measures could be proposed by the council or by initiative petition.

Municipal Corporations—Bonds—Special Assessments.

12. Sections 3245-3253, L. O. L., providing that certain special assessments can be bonded, do not include bonds for water mains.

Constitutional Law—Obligation of Contract—Amendment of Charter.

13. Article I, Section 10, of the United States Constitution, prohibiting a state from enacting any law impairing the obligation of contracts, applies to cities and towns, where they amend their own charters, as they are only agencies of the state, having only the powers which the state has delegated to them.

Constitutional Law—Impairing Obligation of "Contract."

14. The term "contract," as used in Article I, Section 10, of the United States Constitution, is given its ordinary meaning, and means a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things, and embraces and includes all those laws which exist at the time and place where the contract is executed and where it is to be performed, and affect the validity, construction, discharge and enforcement of the contract.

Constitutional Law—"Obligation of Contract"—"Impairing Obligation of Contract."

15. The "obligation of a contract" is the law or duty which binds the parties to perform their agreement, which depends upon the laws in existence when the contract is made; hence, if the duty to perform is lessened, and either party is deprived of the benefit of his contract, or new conditions imposed, adding new duties, either by the repeal or passage of a statute, the obligation of the contract is "impaired," within the meaning of Article I, Section 10 of the United States Constitution; but this does not prohibit a change in the remedy if the new remedy is as substantial as the other.

Municipal Corporations—Improvements—"Contract"—"Impairing Obligation of Contract."

16. Where, under Sections 3245–3253, L. O. L., a property owner takes the privilege of paying a special assessment in installments and waives all irregularities as provided therein, there is a "contract," and an amendment, changing the number and amounts of the installments without the consent of the owner, is invalid, as "impairing the obligation of a contract," within the meaning of Article I, Section 10 of the United States Constitution, and it is no defense that the change is advantageous to the owner.

Municipal Corporations—Assessments—"Contract"—"Impairing Obligation of Contract"—Taxation.

17. Where, under Sections 3245–3253, L. O. L., a property owner takes the privilege of paying a special assessment in installments, and waives all irregularities as provided therein, there is a "contract"; but an amendment to the charter which increases the penalties upon delinquency does not "impair" its obligations, laws prescribing procedure and method of collecting delinquent assessments being but remedies, and not "contracts," within the meaning of Article I, Section 10, of the United States Constitution.

Municipal Corporations—Contracts—"Taxation."

18. The power to assess for special benefits is embraced in the power of taxation; and when it is alleged that a city has surrendered by force of contracts any part of its sovereign power to tax, the agreement must be clearly manifested.

Taxation—"Interest"—"Penalty."

19. Interest, when charged on a delinquent tax, is a penalty to insure prompt payment, and is not a consideration for the forbearance of money, or a part of the tax.

Municipal Corporations—Assessments—Delinquency—Sale—Who may Buy.

20. It is competent to authorize a city to purchase land, in the absence of bidders at a delinquent assessment sale, even though the legislation conferring the authority is enacted after an assessment is made and before the sale for delinquency.

Municipal Corporations—Power to Assess—Waiver of Liens.

21. Where a city fails to enforce payment of special benefit assessments, and levies a general tax to pay interest on the bonds for such improvements, it does not waive its lien on the property.

Municipal Corporations—Special Benefit Assessment Bonds—Liability.

22. Sections 3245–3253, L. O. L., providing for the issuance of bonds to cover special benefit assessments, contemplates that such bonds shall be regarded as liabilities of the city, which the city must pay, without regard to whether the assessments have been or can be collected.

Municipal Corporations—Special Benefits—Bonds—Taxation.

23. A general tax by a city to pay interest on bonds issued to cover special benefit assessments, under Sections 3245–3253, L. O. L., *held* not invalid; the bonds being a debt of the city.

Municipal Corporations—Taxation—Assessments—Payment of Interest.

24. Where a general tax was levied by a city to pay interest on bonds issued to cover special benefit assessments, under Sections 3245–3253, L. O. L., the refusal of the city to accept the tender by a property owner of the assessments without interest was proper.

Municipal Corporations—Constitutional and Statutory Provisions.

25. The amendments to Article IV, Section 1a, providing for initiative and referendum, and Article XI, Section 2, of the constitution, relating to incorporation of municipalities, have not shorn the legislature of power to enact general laws concerning cities and towns.

Municipal Corporations—Special Benefit Assessments—Statutes.

26. Sections 3245–3253, L. O. L., providing that owners of property may postpone payment of assessments by dividing them into installments, applies to every incorporated town and city, and although a city can legislate concurrently on the same subject, it cannot compel an owner to accept its plan.

Municipal Corporations — Paving — Procedure — Notice — Protest — Laches.

27. Where a city council at different times passed resolutions of intention to pave two parts of a street, in which there were defects in publication and posting, but afterward passed a resolution of intention to pave the whole included parts of the street, with proper notice and publication, the council having unlimited power to contract, except that proper notice should be given of the assessments and intention to pave, and a chance given for protest, such defective resolutions cannot invalidate the improvement and assessment proceedings as to a property owner who did not protest at the time and waited six years before protesting.

Municipal Corporations—Improvements—Records.

28. The words "whereas, no protests were received," in a resolution ordering paving, and "no protests having been filed," in the assessment ordinance, is a sufficient showing as to the question of protests after six years.

Municipal Corporations—Special Benefit Assessments—Bonds.

29. Under Sections 3245–3253, L. O. L., relating to bonding cities, and providing that no application to pay assessments in installments shall be received if the amount of the assessment, with any previous unpaid assessment, "shall equal or exceed the valuation of said prop-

erty, as shown by the last tax-roll," it is immaterial that the actual value is less than the assessment.

Municipal Corporations—Improvements—Assessments—Amount—Conclusiveness.

30. Where no fraud is alleged, and the owner admits some benefit from an improvement, a finding by the city council "that the special and peculiar benefit accruing upon each lot * * and in just proportion to benefits" was the amount so assessed is conclusive.

Municipal Corporations—Paving—Front Foot Rule—Validity.

31. The front foot rule of assessment for paving is valid.

Municipal Corporations—Paving—Street Intersection—Special Assessments—Discretion of Council.

32. Where it is discretionary with a city council to include or exclude the cost of intersections when making paving assessments, it cannot be prevented from levying special assessments for an improvement, even though it has in the past paid for the same kind of improvement by general taxation.

Department 1. Statement by MR. JUSTICE HARRIS.

This suit was commenced against the City of Medford, its mayor, councilmen, recorder and treasurer, by Charles D. Colby, who is not only making certain contentions because of the methods previously pursued by the city in raising moneys with which to pay the interest on the bonded indebtedness for improvements, the expense of which had been charged to abutting property by levying special benefit assessments, but he is also attacking an alleged charter amendment known as the Hanson Plan, which was designed to enable the city to refund all its bonded and other indebtedness for paving, sewers and water-mains. After Colby had filed his complaint, and with the consent of all parties, William Stailey filed a separate complaint in this suit against the same parties who had been named as defendants in the Colby complaint; and, hence, this proceeding really involves two suits which, for convenience, have been consolidated into one suit. The assault made by the Stailey complaint is especially directed against the special benefit assessments which the city levied on abutting property, while the Colby

complaint admits the regularity of all the improvement proceedings as well as the validity of all the original special benefit assessments. No evidence was offered by any of the parties in the Circuit Court, and the suit was tried and decided on such admissions as are found in the pleadings, together with certain admissions contained in a written stipulation entered into by the parties concerning the facts and the issues. While most of the facts are either admitted in the pleadings or agreed upon in the stipulation, there are yet some conflicting allegations which the parties were unable to reconcile.

We can more readily understand the nature of this complicated controversy if we first look to the voluminous pleadings and extract from them and the stipulation a condensed statement of the transactions which brought about the conditions existing in the latter part of 1916, at which time it was deemed advisable to submit some method to the legal voters for refunding part or all of the indebtedness of the city; and then it will be appropriate to notice the provisions of two different methods which were devised and submitted to the legal voters, one being known as the Medynski Plan and the other as the Hanson Plan. After referring to the causes which produced the conditions found to exist in 1916, and explaining the provisions of the Medynski and Hanson Plans, attention can be directed to such facts as particularly affect Colby and then to those facts which form the basis of the contentions made by Stailey.

Commencing with the year 1907, and ending with the year 1913, the city of Medford made extensive improvements. Streets were paved; sewers were constructed; and water-mains were laid. The city levied special benefit assessments against the abutting prop-

erty for the purpose of raising funds to pay for these improvements. The expense of the pavement, sewers and water-mains aggregated a large sum; and the cost of the paving alone was approximately $1,000,000. After receiving notice of the special assessments levied against their property for paving and sewers, most of the abutting property owners made application under the statute, commonly known as the Bancroft Bonding Act, to pay their assessments in ten annual installments; and then the city issued bonds as provided by the Bancroft Bonding Act. The charter contains provisions which are modeled after the Bancroft Bonding Act and enable the owner of abutting property to pay an assessment, levied on his property for the laying of water-mains, in installments by filing an application with the city, and the city can then issue bonds in an amount equal to such an assessment; and although it is not in terms alleged in the pleadings that applications were so made under the charter, it is nevertheless a fair inference to say that many of the owners of property assessed for water-mains applied for and were granted the right to pay their water-main assessments in installments. While the parties were unable to agree upon the number, yet, they do agree that some of the abutting property owners neither paid their assessments nor brought themselves within the Bancroft Bonding Act. In some instances where the property owner had not applied for the right to pay his assessment in installments, the city continued the assessment on the lien docket without attempting to enforce collection. Some of the abutting property against which special assessments were levied was not worth as much as the amount of the assessment, either before or after the street improvement was completed, although the special benefit assessment was less

than the valuation of the property as shown by the last tax-roll of the county. The assessed valuation appearing on the county tax-roll was always greater than the amount of the special assessment on a lot, but the real value of a given lot was in some instances less than the amount of the special assessment imposed upon such lot for a street improvement. With the opening of the year 1914, many of the property owners began to discuss and question the validity and amount of the assessments levied against their property for the various improvements, with the result that, in addition to those who had neither paid their assessments in full when due nor applied for the privilege of paying in installments, many property owners who had brought themselves under the Bancroft Bonding Act refused to pay the installments that matured in the years 1914, 1915 and 1916. The bonds which the city had issued under the Bancroft Bonding Act carried interest and this interest was payable semi-annually. Because of the failure of some of those who had not brought themselves within the Bancroft Bonding Act to pay the whole of their assessments when due, and on account of the refusal of many of the property owners who had come under the Bancroft Bonding Act to pay the annual installments, principal and interest, there were no moneys in the treasury with which to pay the interest due each year on the bonds which had been issued under the Bancroft Bonding Act; and it therefore became necessary for the city to take some steps to raise enough money to satisfy the interest. Instead of exercising the power given to it by its charter and enforcing the collection of delinquent assessments by selling the property charged with the assessment, the city resorted to general taxation; and, in each of the years 1914, 1915 and 1916, a tax was levied on all the

taxable property in Medford for the purpose of raising money with which to pay interest on the outstanding bonds. By October, 1916, the city had become indebted in large sums. A portion was for the general expenses of the city and was represented by outstanding warrants; a part was for water-mains and was represented by water-main bonds issued by authority of the charter; and the remainder of the indebtedness was for street improvements and sewers and in the main was represented by bonds issued under the provisions of the Bancroft Bonding Act. This was the condition of the finances of the city when on October 3, 1916, the Medynski Plan was submitted and on December 19, 1916, the Hanson Plan was submitted for approval or rejection by the voters at an election to be held on January 9, 1917.

Each plan was a refunding plan, although one proposed to refund more of the indebtedness than the other. The Medynski Plan was designed to refund the paving indebtedness only, while the Hanson Plan proposes to refund all the existing indebtedness incurred in the improvement of streets and in laying sewers and water-mains. The two plans are different in other respects. The Medynski Plan relies entirely upon general taxation to pay the indebtedness; but the Hanson Plan looks primarily to the abutting property for the funds.

THE MEDYNSKI PLAN: This plan proposed to declare street improvements public necessities, to release all property from the liens of assessments for street improvements, and to reimburse property owners who had made any payments on assessments for street improvements. It provides that the city shall assume all indebtedness for street improvements and refund the debt by the issuance of bonds; that the city shall

pay the indebtedness for street improvements by levying a tax on all taxable property within the municipality; and that the time for the ultimate payment of the indebtedness shall be extended by dividing the debt into fifteen equal payments to run for a period of twenty years with interest, the interest to be paid annually during the first five years and the payments on the principal to commence in the 6th year.

THE HANSON PLAN: This alleged charter amendment is entitled:

"An Act to Amend the Charter of the City of Medford, by adding thereto a new chapter to be known as Chapter 14, consisting of Sections 139 to 170, both inclusive, relating to special assessments for local improvements for paving and otherwise including sewer and water-main heretofore levied and assessed, providing for the collection thereof and the enforcement of such liens and assessments and the issuance and sale of refunding bonds, therefore, to read as follows":

The opening section reads thus:

"All unpaid assessments heretofore levied and assessed for street improvements by paving or otherwise, including sewers and water-mains, whether bonded under the provisions of the Laws of the State of Oregon or the city charter of the City of Medford, or not bonded, shall be collected and collections of such liens enforced as in this act provided. The city council shall by ordinance fix a date when all such unpaid assessments with interest thereon to such date may be paid in whole or in part, notice whereof shall be given as herein provided. The amount of principal and interest of such assessments remaining unpaid at the expiration of such date shall constitute an unpaid balance which, with interest thereon at the rate expressed in the refunding bonds in this act provided for, shall be payable in thirteen (13) years from and after such date during each of the first three years of which only

interest upon such unpaid balance must be paid, and during each of the last ten years of which period there shall be payable one-tenth of such unpaid balance with interest at the bond rate upon the whole unpaid sum. In addition to the annual payments herein required, the option is accorded to pay at the time of each annual payment, one or more tenths of the unpaid balance, but any such optional payment shall be considered as payment of the last maturing installment or installments as the case may be: Provided, that the city council may by ordinance provide for semi-annual payments of interest and principal."

Subsequent sections provide for transferring all special assessments previously made to a lien docket which is called the "consolidated lien docket." The city council is required by ordinance to create a consolidated improvement district comprising street, sewer and water-main improvements where any special assessments remain unpaid. The consolidated lien docket is placed in the hands of the city treasurer for collection, and he is directed to notify property owners that they may pay their unpaid assessments within the time specified in the notice. If a property owner fails to pay any such assessment within the period fixed by the notice given by the treasurer, then, upon the expiration of 20 additional days,

"the city council shall by ordinance authorize the issue of the refunding improvement bonds of the city in an amount equal to the unpaid balance of such assessments, existing at the expiration of the date hereinabove provided for, in convenient denominations not exceeding Five Hundred ($500) Dollars each; and such bonds shall by the terms thereof be payable on or before a date not to exceed fifteen (15) years from and after the date of such bonds which latter date may be fixed by resolution and be payable in their numerical order in gold coin of the United States and bear interest not to exceed six (6) per cent per annum in-

terest payable semi-annually or annually, said interest to be evidenced by coupons attached to said bonds."

The city council is authorized to provide for the sale of the refunding bonds; and the money derived from the sale of these bonds

"shall be applied to the redemption and payment of the outstanding and unpaid City of Medford Improvement Bonds and Warrants for paving, sewers, and water-mains, and to the redemption and payment of coupons of such bonds held by the city and representing moneys advanced by it from taxes and otherwise from its various funds by way of loans to meet, from time to time, maturing interest payments in bond fund districts hereinbefore consolidated."

If any installment of interest or principal is not paid when due it "shall thereupon become delinquent, and shall bear a penalty of five (5 per cent) per centum upon the amount of such delinquency, in addition to the bond rate upon the principal sum so delinquent." The Hanson Plan also contains elaborate provisions for the sale of property where any installment is due or an assessment has become delinquent; it contains sections appertaining to the redemption of property sold for delinquent assessments; and it speaks of reassessments and other subjects not now necessary to notice.

At the city election, held on January 9, 1917, the legal voters rejected the Medynski Plan and approved the Hanson Plan; and, unless the Hanson Plan is adjudged illegal, the city will at once proceed to execute all the powers specified in the measure, will enter unpaid assessments in the consolidated lien docket, give notices, sell bonds and refund all the existing indebtedness for sewers, pavement and water-mains, as provided for by the Hanson Plan.

Charles D. Colby is a legal voter and taxpayer of Medford. In 1916, he became the owner of lot 3 in

block 59 abutting on North Grape Street. Pavement was laid on this street and the cost of the improvement, including street intersections, was assessed, according to the front foot rule, against the abutting property. John M. Deward owned lot 3 at the time the pavement was laid; and, when notified that an assessment of $284.50 had been levied against his property, he filed an application on November 17, 1911, for the privilege of paying the assessment in installments as provided by the Bancroft Bonding Act. The installments were regularly paid until 1914. After having paid all the taxes levied against his property, including the general tax which the city had levied in 1914 for the purpose of raising funds to pay the interest on the outstanding bonds which had been issued under the Bancroft Bonding Act, Colby tendered to the city the installment due on the street assessment against his property, less the interest. The city declined to accept the tender, claiming that Colby was obliged to pay interest as well as principal. Colby refused to pay more than the installment due on the principal, claiming that he had already paid the interest by paying his general taxes. Colby paid the taxes levied against his property during each of the years 1914, 1915 and 1916, but he did not pay any installments on the principal of the street assessment levied on his lot.

William Stailey has been a taxpayer of Medford since 1909. He owns six lots abutting on South Grape Street. Lot 6 is a corner lot and abuts on Sixteenth Street as well as on South Grape Street. Pavement was laid on South Grape Street and in 1911 the cost of the improvement, including street intersections, was assessed according to the front-foot rule against the abutting property. An assessment of $256 was levied on each of the six lots on account of the South Grape

Street pavement, and, in 1912, an additional $444 was charged against lot 6 for its share of the expense incurred in paving Sixteenth Street. Although each lot was assessed by the county assessor for more than the amount of the special assessment levied against it, nevertheless, in truth, both before and after the completion of the improvements, each lot was and now is worth less than the special assessment charged against it. Stailey did not make application for the privilege of paying his assessments in installments and consequently the full amount of the assessments for South Grape Street became due in 1911 and for Sixteenth Street in 1912.

Based upon grounds which will be stated and considered hereafter, Colby prays for a decree adjudging the Hanson Plan void and enjoining the sale of bonds under it; and, further, that the city be required to accept the principal of the unpaid assessments less the interest collected by general taxation, or else that the city be enjoined from collecting any of the special assessments for street improvements and that the municipality be compelled each year to levy a sufficient millage tax on all the taxable property to meet the maturing indebtedness.

The prayer of the Stailey complaint is for an annulment of the special assessments imposed upon his property and that the city be required to levy a sufficient millage tax against all the taxable property to pay the outstanding indebtedness.

The trial court rendered a decree adverse to the contentions made by Stailey, and also decreed that the Hanson Plan was invulnerable to attack, and that it is a valid amendment to the city charter. The plaintiffs appealed.

MODIFIED.

For appellants there was a brief and an oral argument by *Mr. F. J. Newman.*

For respondents there was a brief over the names of *Mr. Fred W. Mears, Mr. Alfred E. Reames* and *Mr. Howard A. Hanson,* with oral arguments by *Mr. Mears* and *Mr. Reames.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The foregoing detailed statement may be summarized thus: The city had laid sewers, pavement and water-mains and had assessed the cost of these improvements to the abutting property; most of the owners of property assessed for sewers and pavement had made application to pay their assessments as provided for by the Bancroft Bonding Act; presumably most of the owners of abutting property which was charged with the cost of laying water-mains had applied for the privilege of paying these assessments in installments as provided for by the municipal charter; some property owners, who had not applied for the privilege of paying sewer and street assessments as permitted by the Bancroft Bonding Act, as well as some owners who had not secured permission to pay water-main assessments in installments as authorized by the charter, did not pay their assessments when they became due; commencing with the year 1914, many property owners who had secured the right to pay their assessments in installments refused to pay the installments as they matured; bonds had been issued under the Bancroft Bonding Act for street and sewer improvements in an amount equal to the total amount of the assessments brought within the Bancroft Bonding Act; bonds had been issued under the provisions of the charter for

water-mains in an amount equal to the total water-main assessments which had been brought within those provisions of the charter which permit the owner to pay in installments; in 1914, the city owed a large sum for pavement, sewers and water-mains; some of this indebtedness had not been transferred into bonds, but most of it was represented by bonds which were then outstanding, the water-main bonds having been issued under the city charter and the sewer and paving bonds having been issued under the state law known as the Bancroft Bonding Act; the outstanding bonds authorized by the Bancroft Bonding Act aggregated considerably more than half of a million dollars and the total paving indebtedness, bonded and otherwise, approximated $1,000,000; because of a failure of many of the property owners to pay their assessments, when they became due, there was no available money in the treasury to pay the outstanding indebtedness and it therefore became necessary in each of the years 1914, 1915 and 1916, to levy a sufficient general tax to pay the interest which matured annually; two plans to refund indebtedness were devised, one being known as the Medynski Plan and the other as the Hanson Plan; the Medynski Plan proposed to refund the paving indebtedness only, while the Hanson Plan is designed to refund the paving, sewer and water-main indebtedness, whether bonded or otherwise; both plans were submitted to the legal voters at an election, with the result that the Medynski Plan was rejected and the Hanson Plan approved. The defendants aver that the Hanson Plan was regularly adopted and that it is now a part of the municipal charter; and, unless the Hanson Plan is held to be invalid, the city intends to sell bonds and refund all the sewer, paving and water-main in-

debtedness in the manner prescribed by the Hanson Plan.

Colby does not question the regularity of any of the improvement proceedings, nor does he assail the validity of any of the original special assessments; but he does contend that the Hanson Plan was not regularly adopted, and that, even though it be assumed that it was regularly adopted, it nevertheless cannot be enforced against the lot owned by him. He contends that the proceedings were irregular because: (1) The measure was at all times without an enacting clause; and (2) it was a measure which competed with the Medynski Plan and was not filed within the time prescribed for the filing of competitive measures. Colby says, too, that the city cannot lawfully enforce the provisions of the measure, even if it should be concluded that the procedure was faultless. He insists that the application filed by Deward for the right to pay under the terms of the Bancroft Bonding Act and the acceptance of the application by the city created a contract, the obligations of which cannot be impaired by changes which will be wrought by the Hanson Plan. The contention is that the Hanson Plan changes the time for payment, alters the amount of the installments, imposes penalties not contemplated by the Bancroft Bonding Act, and increases the burdens upon the Colby lot by enabling the city to purchase property at delinquent assessment sales and thus remove it from taxation. Colby concedes that the city can pay for paving by assessing the cost against abutting property, or by levying taxes on all the taxable property in the city; but he contends that the city cannot do both. He argues that when taxes were levied on all the taxable property in 1914, 1915 and 1916, and paid by the owners of the property taxed, the levy and payment of such

taxes operated as an election by the city, consented to by the property owners, to pay for the improvements with taxes collected from all the taxable property; and that the city should be compelled to pay all the paving indebtedness by general taxation, because it would be inequitable to permit an enforcement of the special assessments.

Stailey does not admit that the improvement and original assessment proceedings were regular. If, however, it is ruled that the improvement and assessment proceedings were valid, or are now unassailable, he argues that to enforce the assessment against his six lots: (1) Would be tantamount to confiscation; (2) would result in unequal and double taxation (a) because his lots are charged with their share of the expense of paving the street intersections on Grape Street, and at the same time are taxed for the expense of paving the street intersections on Main Street and Oakdale Avenue where the expense of the street intersections was not charged against the abutting property; and (b) because the city permitted many property owners to file applications under and to obtain the privilege of the Bancroft Bonding Act when their property was worth less than the amount of the assessment, and, since such property cannot be sold for the amount of the assessment against it, the difference must of necessity be collected by general taxation, and consequently the Stailey lots will be compelled to pay the assessments imposed upon them and also a part of the assessments levied against other property.

The measure known as the Hanson Plan was at all times without an enacting clause. The Hanson Plan and The Medynski Plan were submitted at the same election and it is manifest that the former was a competitive measure. It is true that the scope of the Han-

son Plan was broader than that of the Medynski Plan; but it is also true that each plan provided for the refunding of the indebtedness incurred for street pavement. If both measures had received a majority of the votes, and if the vote had been exactly the same for and against each measure, all persons would probably agree that as to street paving indebtedness each measure conflicted with the other and both could not be applied to the street paving indebtedness. If A conducted a grocery store on one side and B had a combined grocery and hardware store on the other side of the street it probably would be difficult to convince either that the other was not a competitor in the grocery business. Each measure competed with the other for the votes of the electors and each was a competitor of the other on the subject of refunding the paving indebtedness. Before attempting, however, to ascertain the effect of the omission of the enacting clause, or to determine whether its character as a competitive measure prevented the Hanson Plan from being legally adopted, it will be necessary first to refer to some facts not already mentioned.

An initiative petition for the submission of the Medynski Plan to the legal voters was filed with the recorder on October 3, 1916. This petition was signed by a sufficient number of qualified electors and in every respect complied with the ordinance regulating the exercise of the power of the initiative reserved to the legal voters of cities and towns. The recorder transmitted the petition to the city council. Thirty days expired without any action being taken by the city council and the recorder then took possession of the petition and regularly caused the Medynski Plan to be printed on the ballots as a proposed amendment to the

charter to be rejected or approved by the legal voters of the city.

The council employed an expert to investigate the financial affairs of the municipality. This expert reported to the council that in order to protect the credit of the city it would be necessary to refund the sewer, water-main and street improvement indebtedness. Acting on this report the city council caused an initiative petition to be drawn and circulated for the submission of the Hanson Plan to the electorate. After being signed by more than the required number of qualified electors, the petition was regularly filed with the recorder of the city on December 19, 1916. Colby alleges in his complaint that the recorder immediately transmitted the petition to the city council, and that on the same day, December 19, 1916, the council ordained the measure. The recorder then caused the Hanson Plan to be printed upon the ballots as a proposed amendment to the charter for rejection or approval by the legal voters of the city. The election occurred on January 9, 1917, and resulted in the approval of the Hanson Plan and the rejection of the Medynski Plan; and on January 13, 1917, the mayor of the city published his proclamation declaring that the Hanson Plan was in full force and effect as a part of the city charter.

At the time of the election the municipality was operating under a charter which had been originally enacted by the legislature and subsequently amended in some particulars by the legal voters of the city in the exercise of the initiative. Section 23 of the charter as originally enacted by the legislature, and as still in force, provides that: "All ordinances shall contain the enacting clause, 'The City of Medford doth ordain as follows.'" In 1907, the city council passed ordi-

nance No. 124 and amendatory ordinance No. 125, prescribing the procedure to be observed in the exercise of the initiative and referendum powers which had been reserved to the legal voters of cities and towns in 1906 by the adoption of the amendments to the Constitution known as Article IV, Section 1a, and Article XI, Section 2. Section 14 of ordinance No. 124 reads thus: "The enacting clause of all measures submitted to the people and approved by them shall be: 'The people of Medford do ordain as follows.'" Other sections of this and the amendatory ordinance material to this discussion are as follows:

"Enactments or amendments of the city charter of the city of Medford, Oregon, may be proposed by the city council thereof by ordinance or resolution receiving the affirmative vote of a majority of said council, and approved by the mayor, or by initiative petition signed by not less than fifteen (15) per cent of the legal voters of said City of Medford, and submitted to the voters of said city for approval or rejection as hereinafter provided, at a general election or a special election called by the said council for such purpose. Ordinances may be proposed by initiative petition signed by not less than fifteen (15) per cent of the legal voters of said city for approval or rejection, by order of the city council, approved by the mayor, or by referendum petition signed by not less than ten (10) per cent of the legal voters of said city, as hereinafter provided * * ": Section 1.

"Not less than two weeks before any regular or special election at which any ordinance, part of an ordinance or proposed charter amendment is to be submitted to the people, the recorder shall cause to be printed in a newspaper published in and of general circulation in said city of Medford, Oregon, a full and correct copy of the title and text of each measure to be so submitted, with the numbers and forms in which the ballot title thereof will be printed on the official ballot and the recorder shall also cause similar copies to be

posted in three public places in said city for a period of not less than two weeks immediately prior to such election": Section 9.

"If any ordinance, or amendment to the charter of said city shall be proposed by initiative petition, said petition shall be filed with the recorder and he shall transmit it to the next session of the council, who shall then either ordain or reject the same, and if the council shall reject said proposed measure, or shall take no action thereon for a period of thirty days after such measure shall have been submitted, then the said recorder shall cause the same to be submitted to the people for approval or rejection at the next ensuing election held in said city. The council may ordain said ordinance or amendment and refer it to the people, or it may ordain said ordinance without referring it to the people, and in that event, it shall be subject to referendum petition in like manner as other ordinances. If the council shall reject any such measure, or take no action thereon, it may ordain a competing ordinance or amendment, which shall be submitted to the vote of the people by the recorder at the same election at which said initiative proposal is submitted. Such competing measure, if any, shall be prepared by the council and ordained within the thirty days allowed for its action on the measure proposed by initiative petition. The mayor shall not have power to veto either of said measures": Section 13.

A few days prior to the city election it was discovered that the Hanson Plan was without an enacting clause; and, therefore, on January 8, 1917, the day before the election, the council passed ordinance No. 865, amending Section 14 of ordinance No. 124, so as to make it read thus: "No enacting clause shall be necessary on measures enacted by the people." The ordinance contained an appropriate emergency clause and on the day of its passage was signed by the mayor and it became effective immediately.

1, 2. State Constitutions usually contain provisions declaring that all bills shall contain an enacting clause of a prescribed form. In some jurisdictions it is held that such a provision in a Constitution is only directory; but in Oregon, as well as in most of the states, a provision in the state Constitution declaring that "the style of all bills shall be" of a prescribed form, is construed to mean that a statute must contain an enacting clause. In some states the enacting clause must correspond exactly with the form found in the Constitution, while, in others, an enacting clause, substantially like the one prescribed, will be sufficient. Illustrations may be found in *Cape Girardeau* v. *Riley,* 52 Mo. 424 (14 Am. Rep. 427); *McPherson* v. *Leonard,* 29 Md. 377; *People* v. *Dettenthaler,* 118 Mich. 595 (44 L. R. A. 164, 77 N. W. 450); *State* v. *Rogers,* 10 Nev. 250 (21 Am. Rep. 738); *Commonwealth* v. *Illinois C. R. Co.,* 160 Ky. 745 (170 S. W. 171, L. R. A. 1915B, 1060); *State* v. *Wright,* 14 Or. 365, 374 (12 Pac. 708). See, also: 36 Cyc. 967. Following the doctrine announced in *Cape Girardeau* v. *Riley,* 52 Mo. 424 (14 Am. Rep. 427), the same court ruled that the omission of an enacting clause did not invalidate an ordinance, even though the charter prescribed the form and required the insertion of an enacting clause: *City of St. Louis* v. *Foster,* 52 Mo. 513. In *Chicago & E. I. R. R. Co.* v. *Hines,* 82 Ill. App. 488, it was held on the authority of the *City of St. Louis* v. *Foster, supra,* and *People* v. *Murray,* 57 Mich. 396 (24 N. W. 118) that the omission of an enacting clause did not invalidate an ordinance even though directed by the municipal charter; but a contrary conclusion was reached in *Milton Burrough* v. *Hoagland,* 3 Pa. Co. Ct. 283. In *Galveston, H. & S. A. Ry. Co.* v. *Harris* (Tex. Civ. App.), 36 S. W. 776, the court held that, where a state law re-

quired ordinances to contain an enacting clause, an omission of the clause invalidated the ordinance. In Oregon it has been decided that a substantial compliance with a charter requirement is sufficient: *State* v. *Kelsey,* 66 Or. 70, 77 (133 Pac. 806). See, also: *State* v. *Dalles City,* 72 Or. 337, 350 (143 Pac. 1127).

3. If the Constitution of this state prescribed the form and ordered the use of an enacting clause in an ordinance or other municipal measure, then the omission of an enacting clause would render the measure void; and, for the purposes of the instant case we may assume that an enacting clause must be used if the charter or a state law so provides. We now inquire, therefore, whether the Constitution, or a statute or the city charter required the Hanson Plan to contain an enacting clause. In Article IV, Section 1 of the State Constitution, it is declared that: "The style of all bills shall be: 'Be it enacted by the people of the state of Oregon.' " Manifestly, this provision of the Constitution neither applies to municipal ordinances nor to a charter amendment initiated and adopted by the legal voters of a city or town. In this connection it is interesting to note, in passing, that in the State of Oklahoma where, as here, the people exercise the initiative and referendum powers, a constitutional provision like ours was held to apply only to direct legislation by the people and it was decided that a measure enacted by the legislature was valid, even though it entirely omitted an enacting clause: *Ex parte Hudson,* 3 Okl. Cr. Rep. 393 (106 Pac. 540, 107 Pac. 735).

4. A state statute is relied upon by Colby and he points to Section 3224, L. O. L. This section, however, has no application for the reason that it is one of the sections of an act passed in 1893: "For a general law for the incorporation of cities and towns in the State of

Oregon." Section 3224, L. O. L., is a part of the charter of cities and towns incorporated under that general law, but the City of Medford was incorporated under a special legislative act which was followed by subsequent special legislative acts defining the powers of Medford, and hence Section 3224, L. O. L., does not apply to Medford.

5. It is argued that Section 23 of the city charter requires an enacting clause; but upon examination it will be seen that this section of the charter only applies to ordinances. The Hanson Plan was submitted, on an initiative petition, to the people as a charter amendment and not as a mere ordinance. When the last charter was enacted by the legislature in 1905, the legal voters of cities and towns were without power to amend their own charters, for it was not until 1906 that the initiative power was conferred upon the legal voters of cities and towns, and, consequently, it is obvious that Section 23, at the time of its original amendment, could only apply to pure ordinances. In the sections of our state Constitution dealing with the initiative and referendum powers, a distinction is constantly recognized between a statute and an amendment to the Constitution; and so, too, the same distinction was recognized by the legislature when it enacted Chapter 226, Laws 1907, codified in Sections 3470 to 3483, L. O. L., inclusive, prescribing the procedure for the exercise of the initiative and referendum powers, and the legislature likewise appreciated the difference between an amendment to a charter and a mere ordinance, for Chapter 226, Laws 1907, carefully differentiates ordinances from charter amendments. Section 23 of the charter has not been changed since its original enactment; it speaks now as it did before of "ordinances" only; and, hence, its mandate only

applies to ordinances. We, therefore, conclude that neither the state Constitution nor any state law applicable to Medford nor its present city charter compels the use of an enacting clause in a charter amendment which has been initiated and submitted upon a petition of legal voters.

6. Colby argues, however, that Section 14 of ordinance No. 124, required an enacting clause in the Hanson Plan. The language of this ordinance includes charter amendments, whether initiated upon a petition of the voters or submitted by the council, as well as ordinances submitted to the people, for the reason that the words "all measures" are employed. Running throughout ordinance No. 124, is a plain recognition of the distinction between charter amendments and ordinances; and, therefore, when Section 14 commands that "all measures" submitted to the people shall contain the prescribed enacting clause, the inevitable conclusion is that the section includes charter amendments as well as mere ordinances, for the reason that the term "measures" is comprehensive and includes charter amendments. The Hanson Plan was not initiated and voted upon as a pure ordinance; but it was initiated upon a petition signed by legal voters and was voted upon as a proposed amendment to the charter.

7. This ordinance, which contains the only affirmative legislation requiring an enacting clause in a proposed amendment to the Medford charter, was enacted by the city council, under the authority of Article IV, Section 1a of the state Constitution, and it prescribes the method which shall be employed in the exercise of the initiative and referendum powers reserved to the legal voters of cities and towns. The council was empowered to enact the ordinance, and, therefore, if Section 14 was in force from the time of the filing of the initia-

tive petition for the Hanson Plan until the election, the charter amendment was not legally adopted: *State* v. *Kelsey,* 66 Or. 70 (133 Pac. 806). On the day before the election, however, the council passed ordinance No. 865, changing Section 14 of ordinance No. 124 and expressly declaring that "no enacting clause shall be necessary on measures enacted by the people." The same legislative authority that imposed the necessity for an enacting clause afterwards removed the necessity. If the council had power to legislate on the subject in the beginning, it likewise had power to change that legislation. When the initiative petition was filed an enacting clause was necessary, but when the people voted upon the measure an enacting clause was not necessary; and, if every notice necessary to confer jurisdiction was given and every formal step required was taken, it would be subordinating substance to form to say that the Hanson Plan was not legally adopted merely because the measure did not contain an enacting clause when the petition was filed. Had the measure itself been changed, quite a different question would be presented; but no alteration was made in the measure. It is admitted that the petition was signed by the requisite number of legal voters and, if it be assumed that all the jurisdictional formalities were observed, it necessarily follows that when the electors voted on the Hanson Plan they voted on a measure which a competent legislative authority had previously said did not need an enacting clause. All that occurred prior to the election was mere formality and preparation. The election was the vitalizing act and when that act occurred the measure itself was complete. The votes of the electorate operated upon a measure which contained all the formalities required by positive legislation.

8. Having concluded that the omission of the enacting clause did not violate any written law of the state or municipality, it yet remains to determine whether an enacting clause is essential in the absence of legislation prescribing it. In the *Seat of Government Case,* 1 Wash. Ter. 115, it was held that an enacting clause was necessary; but there was a vigorous dissenting opinion. In *Watson* v. *Corey,* 6 Utah, 150 (21 Pac. 1089), the court ruled that, in the absence of a statute, or Constitution requiring it, an enacting clause is not necessary; and the same conclusion is announced in *Ex parte Hudson,* 3 Okl. Cr. Rep. 393 (106 Pac. 540, 107 Pac. 735). Not only the number of judicial precedents but also the weight of reason supports the view that an enacting clause is not necessary when there is no Constitution, statute or other legislation requiring it. However, all possible doubt is removed in the instant case, for the reason that a competent legislative authority enacted a positive law dispensing with enacting clauses in measures enacted by the people.

9. Colby further contends that Section 3482, L. O. L., makes it unlawful to submit an initiative measure to the people within ninety days after the petition is first presented to the council. This section of the Code has no application to Medford. It is only one of the provisions of Chapter 226, Laws of 1907, providing for a method for the exercise of the initiative and referendum, and it does not apply to such cities and towns as have prescribed their own procedure. Article IV, Section 1a, empowers a city or town to provide for its own method of exercising the initiative and referendum; and when Medford enacted ordinances 124 and 125 a complete method was adopted in lieu of the method which is permitted but is not made compulsory by Chapter 226, Laws 1907. The petition was filed in

ample time to permit the publication and posting required by Section 9 of the ordinance; and, since it is not claimed that the prescribed notice was not given, it may be assumed that the recorder complied with the ordinance.

10. Although a competitive measure within the meaning of ordinance No. 124, the Hanson Plan was nevertheless legally submitted to the legal voters. Recurring to Section 1 of ordinance No. 124, as amended by ordinance No. 125, it will be observed that an amendment to the city charter may be *proposed:* (1) By the council (a) by ordinance or (b) by resolution; or (2) an amendment may be *proposed* by an initiative petition signed by not less than 15 per cent of the legal voters; and the *proposed* amendment is submitted to the voters "as hereinafter provided." Ordinances may be *proposed:* "By initiative petition signed by not less than fifteen (15) per cent of the legal voters of said city for approval or rejection, by order of the city council, approved by the mayor, or by referendum petition." Turning to Section 13 of ordinance No. 124, it will be seen that if an ordinance or an amendment to the charter is proposed by an initiative petition, the petition must be filed with the recorder who must then transmit it to the council. The council may then (1) ordain or (2) reject the measure or (3) do nothing. If the council rejects the proposed measure or takes no action for a period of thirty days, the measure must be submitted to the legal voters. The council may "ordain" the measure whether it be an ordinance or charter amendment, but the consequences may be different. The council may ordain an initiated ordinance without referring the ordained ordinance to the legal voters, because the council has the power to enact ordinances, subject of course to the right of the people to refer

the ordinance by a referendum petition. However, the council does not have power to amend the charter; the council can only *propose* an amendment to the charter "by ordinance or resolution." If the legal voters *propose* a charter amendment the council can (1) "ordain" or (2) reject such proposed amendment or (3) take no action; but in either event such proposed amendment must be submitted to the legal voters. If the council ordains such proposed charter amendment, the action of the council only has the effect of a recommendation; and, hence, the measure goes to the legal voters with a favorable recommendation from the council; if the council rejects the measure, nevertheless the proposal must be submitted to the legal voters, but it goes to the people stamped with the disapproval of the council; and if the council takes no action at all the proposed amendment is submitted to the people without a direct expression of opinion by the council. Although the council cannot prevent a proposed charter amendment, initiated by a petition of legal voters, from being submitted to the electorate, it can either disapprove of or decline to express a direct opinion upon the measure, and then itself "ordain" and thus originate and propose an amendment to be submitted to the electorate in competition with the proposed amendment initiated by the legal voters; and when the two proposals are voted upon, the legal voters choose between the amendment *proposed* by the council and the one *proposed* by the signers of the initiative petition. Colby insists that none but the council can prepare and submit a competitive measure, and that the legal voters are prohibited from submitting a competitive measure by the filing of an initiative petition. That part of Section 13 which refers to a limitation on the right to submit competitive measures applies only to competi-

tive measures prepared by the council. The section does not contain a line or a word directly or even inferentially prohibiting the legal voters from submitting a competitive measure.

11. Ordinance No. 124 as amended places no limitation upon the right of the legal voters to submit a competitive measure by an initiative petition. The Hanson Plan was not *proposed* by the council within the meaning of Sections 1 and 13; but it was *proposed* by the legal voters and in every sense of the term was a pure initiative measure originated by the legal voters in the exercise of the power of the initiative. It is true that the council caused the Hanson Plan to be prepared, but their interest and activity could not and did not change the manifest form and character of the petition after it had been signed by the required number of legal voters and properly filed as an initiative petition. Although the council caused the Hanson Plan to be prepared, the measure was attached to initiative petitions which were circulated and signed by the requisite number of voters and then filed as a pure initiative petition, and when the petition was filed it was an amendment *proposed* by initiative petition within the meaning of Section 1; and when the council subsequently ordained it that body merely exercised the power granted by Section 13 and recommended it to the favorable consideration of the voters. The Hanson Plan was *proposed* by the people and not by the council within the meaning of the law governing Medford.

Having determined that no rule of procedure was violated in the adoption of the Hanson Plan, we can now inquire into the validity of the measure itself. Throughout the investigation we must not lose sight of the fact that the Hanson Plan proposes to refund the indebtedness incurred for street improvements, sewers

and water-mains. Most of this indebtedness is represented by bonds and the remainder is presumably represented by city warrants. The bonds for street improvements and for sewers were issued on the authority of the Bancroft Bonding Act, while the bonds for water-mains were issued under the provisions of the city charter. Both Colby and Stailey own property which has been assessed for street paving. The assessment against the Colby property is payable in installments because the owner filed an application under the Bancroft Bonding Act; but the whole of the assessments against the Stailey property has been due for at least five years for the reason that the owner never filed any application under the Bancroft Bonding Act. Bonds have been issued because of the application to pay the Colby assessment in installments, but no bonds have been issued on account of the assessments against the Stailey property. The record does not disclose whether any assessments for water-mains have been levied upon any property owned by either Colby or Stailey; and, hence, it will be assumed that no water-main bonds have been issued on the faith of water-main assessments against property owned by either one of the plaintiffs.

On account of the questions arising out of the attack made on the Hanson Plan it will be convenient at this time to notice some of the material provisions of the Bancroft Bonding Act as well as some of the provisions of the charter relating to water-main assessments and bonds.

The Bancroft Bonding Act, as originally enacted and subsequently amended, is codified in Sections 3245 to 3253, L. O. L., inclusive. By the terms of Section 3245, L. O. L., whenever any city or town has improved a street or laid a sewer and has assessed the cost of

such improvement to the abutting property according to the provisions of the charter of such city or town,

"it shall be lawful for the owner of any property so assessed for such improvement or sewer in the sum of $25 or more, at any time within ten days after notice of such assessment is first published," to file with the city "a written application to pay said assessment in installments, and such written application shall state that the said applicant and property owner does thereby waive all irregularities or defects, jurisdictional or otherwise, in the proceedings to improve the street or lay the sewer for which said assessment is levied and in the apportionment of the cost thereof. Said application shall contain a provision that the said applicant and property owner agrees to pay said assessment in ten annual installments, with interest at the same rate on all of said assessments which have not been paid, as that expressed in the bond issued to pay for such improvement."

No application shall be received if the amount of an assessment against a lot with any previous assessment for street improvements or sewers remaining unpaid "shall equal or exceed the valuation of said property, as shown by the last tax-roll of the county in which it is situated." If, however, an assessment together with previous assessments exceeds the valuation of the property as shown by the last tax-roll of the county, the owner may pay in cash the excess of the unpaid assessments over the valuation of the property and then file an application to pay the remainder in installments.

Section 3247, L. O. L., directs that after the expiration of the time for filing applications for the right to pay in installments, the city shall enter in a docket kept for that purpose a description of the lot assessed and the amount of the unpaid assessments and "such docket shall stand thereafter as a lien docket as for

taxes assessed and levied in favor of such city," for the unpaid assessment with interest at 6 per cent per annum against the lot assessed until the assessment and interest are fully paid and "all unpaid assessments and interest shall be and remain a lien on each lot * * in favor of such city."

Section 3248 provides for the issuance of bonds and directs that when the lien docket is made up "such city shall by ordinance authorize the issue of its bonds in convenient denominations, not exceeding $500 each, and in all equal to the total amount of unpaid assessments," for which application to pay under the provisions of the act have been filed;

"and such bonds shall, by the terms thereof, mature in ten years from the date thereof, and be payable in gold coin of the United States, and bear interest not to exceed six per cent per annum, interest payable semi-annually, said interest to be evidenced by coupons attached to said bonds; provided, the right to take up and cancel such bond or bonds, upon the payment of the face value thereof, with accrued interest to the date of payment, at any semi-annual coupon period at or after one year from the date of such bond or bonds, shall be and hereby is vested in the city issuing such bond or bonds."

The bonds are signed by the mayor, president or other executive head of the city, countersigned by the auditor, clerk or other recording officer, and authenticated by the seal of the city. The words "improvement bond" with the name of the city issuing the bonds are inscribed or printed on the face of the bond. The bonds are then sold and the proceeds of the sale credited to the improvement fund for which the bond was issued and

"the accrued interest and premium accruing from the sale of said bonds shall be credited to the general fund

of said city, the fund from which interest is paid on street and sewer warrants, or to the improvement bond sinking fund," as the city shall direct.

Section 3249, L. O. L., prescribes that the assessment shall be divided into ten installments, one of which shall be paid each year with one year's interest "on unpaid assessments or installments." Should the owner fail

"to pay the sum or sums aforesaid as the same shall become due * * then the same shall be collected in the same manner and with the same penalties as delinquent street or sewer assessments are collected in such city."

Section 3253, L. O. L., prescribes that "such city may redeem such bonds" by giving "notice of the readiness of such city to redeem" by publication in a newspaper.

12. The Bancroft Bonding Act does not include bonds for water-mains. The water-main bonds depend for their validity upon an amendment to the charter which was adopted by the legal voters of the city in 1909. The charter authorizes the city to assess the cost of a water-main against the abutting property, and the assessment is collected in the same manner as assessments for street improvements. If a lot is assessed for $15 or more the owner can pay the assessment in ten installments by filing an application substantially like the one provided for by the Bancroft Bonding Act, and the subsequent steps required by the charter are practically the same as those prescribed by the Bancroft Bonding Act.

Having explained the procedure, purpose and scope of the Hanson Plan and having outlined the provisions of the Bancroft Bonding Act we can attempt to ascertain whether the Hanson Plan impairs the obligation

of any contract that may have been created by the Bancroft Bonding Act. The argument advanced by Colby is that a contract was created when the city received the application bringing the assessment against his property within the provisions of the Bancroft Bonding Act; and he argues that not only the Bancroft Bonding Act but also all that part of the city charter which at that time related to the collection of delinquent street assessments was by force of law written into and became a part of the contract. The Bancroft Bonding Act prescribed the time and manner in which the assessment should be paid while the city charter provided the means and procedure for enforcing the collection of an assessment whenever it became delinquent. Colby contends that the Hanson Plan changes the amount of the installments, varies the time in which payments are to be made, alters the procedure for enforcing the collection of a delinquent assessment, and adds penalties and burdens. The Bancroft Bonding Act divides the original assessment into ten installments and requires that one installment with interest at 6 per cent per annum on the unpaid installments shall be paid each year; but the Hanson Plan treats the unpaid remainder as an integral, and, after dividing it into ten installments, extends the time of payment over a period of thirteen years; and if an installment is paid in advance it shall be applied as payment of the last maturing installment. The charter provided that a delinquent assessment should be collected by a sale of the assessed property "in the manner provided by law for the sale of delinquent state and county tax," and the owner "shall have the right of redemption in the manner and with like penalties as is provided by the general laws of the state for redemption from tax sales." The Hanson Plan

imposes a penalty of 5% on an installment when it becomes delinquent, and the property is then sold "for a sum sufficient to pay the delinquent and unpaid assessment thereon or installment thereof with interest, penalty and costs."

The Hanson Plan permits the owner to redeem at any time within two years from the date of sale upon payment of the amount for which the property was sold with interest at the rate of 15% per annum together with all taxes and special assessments, interest, penalties, costs and other charges thereon paid by the purchaser of such property at or since such sale, with like interest thereon. The charter refers to the "law for the sale of delinquent state and county tax" and to redemption "as is provided by the general laws of the state for redemption from tax sales." These provisions of the charter were enacted in 1905. The legislature enacted a statute in 1907 covering the subject of tax collection and this enactment was in turn liberally amended in 1913: Chapter 267, Laws 1907; Chapter 184, Laws 1913. We need not determine the effect of the amendments of the state law, nor is it necessary to ascertain whether the Hanson Plan is different from the state law in the respects contended for by Colby, but it will be sufficient for the purposes of the instant case to assume, without deciding, that there is a difference between the method and penalties provided by the charter and the methods and penalties proposed by the Hanson Plan. Colby also complains because the Hanson Plan attempts to provide for a suit for the foreclosure of a delinquent assessment; and he further objects to the Hanson Plan for the reason that the measure enables the city to purchase property at a delinquent assessment and to hold it for two years and thus reserve it from taxation for that period of time.

13–15. The federal Constitution prohibits a state from passing any law impairing the obligation of contracts: Article I, Section 10; and this prohibition applies to cities and towns when they amend their own charters, because they are but agencies of the state exercising legislative power which the state has delegated to them: *Straw* v. *Harris,* 54 Or. 424, 437 (103 Pac. 777). If the Hanson Plan impairs the obligation of any contract created by the Bancroft Bonding Act, then to that extent the Hanson Plan is void. The term "contract" is given its ordinary meaning, and, as used in the Constitution, means a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things: *Ladd* v. *Portland,* 32 Or. 271, 274 (67 Am. St. Rep. 526, 51 Pac. 654). The obligation of a contract is defined as the law or duty which binds the parties to perform their agreement: *Walker* v. *Whitehead,* 16 Wall. 314 (21 L. Ed. 357); 6 R. C. L. 324; *Edwards* v. *Kearzey,* 96 U. S. 595, 600 (24 L. Ed. 793); and this depends upon the laws in existence when the contract is made: 8 Cyc. 931. If the duty to perform is lessened and either party is deprived of the benefit of his contract, the obligation of the contract is impaired. The obligation of a contract is impaired by the repeal of a law which constitutes a contract, or by a statute which alters the terms of the contract by imposing a new condition or which adds new duties: 6 R. C. L. 328. The established rule is that every contract embraces and includes all those laws which exist at the time and place where the contract is executed and where it is to be performed, and affect the validity, construction, discharge and enforcement of the contract: *Walker* v. *Whitehead,* 16 Wall. 314 (21 L. Ed. 357); *Edwards* v. *Kearzey,* 96 U. S. 595 (24 L. Ed. 793). In *Louisiana* v. *New Orleans,* 102 U. S. 203, 206 (26

L. Ed. 132), the Supreme Court of the United States said:

"The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

While the laws which afford the means by which a contract may be enforced, enter into and become a part of the contract, the state can nevertheless change the remedy, if the change does not impair any substantial right secured by the contract: *Walker* v. *Whitehead,* 16 Wall. 314 (21 L. Ed. 357). If the change still leaves a remedy and the new remedy is as substantial and efficacious as the remedy which existed when the contract was made, the obligations of a contract are not impaired: Cooley's Const. Lim. (5 ed.), 348; 8 Cyc. 999 In *Waggoner* v. *Flack,* 188 U. S. 595, 602 (47 L. Ed. 609, 23 Sup. Ct. Rep. 345), the court said:

"In the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

16. Under the terms of the charter a property owner is notified that an assessment has been made against his property; and if he does not pay the assessment within ten days from the service of notice, the city can enforce the payment by a sale of the property. The Bancroft Bonding Act interposes, however, and offers to the property owner the privilege of paying the assessment in installments. The property owner cannot accept this offer unless he agrees to waive all ir-

regularities or defects, jurisdictional or otherwise, in the proceedings relating to the improvement, the assessment, and the apportionment of the cost. The city agrees to permit the owner to pay his assessment in installments in consideration of the waiver; the owner agrees to waive irregularities and defects in consideration of the privilege of paying in installments; each party gives and each receives a consideration; and in the end the parties have made a contract. The obligation of the city is to permit the owner to pay in installments in the amounts and at the times prescribed by the Bancroft Bonding Act, and the obligation of the owner is to pay at the times and in the amounts specified. The city cannot by amendment to its charter change the terms of the contract without the consent of the owner. The Hanson Plan attempts to change the contract made between the city and owner by changing the number and amount of the unpaid installments and extending the time over a period of thirteen years. The right of the city to change the very substance of its contract does not depend upon whether the change is advantageous to the owner, but it is dependent upon the consent of the owner; and, hence, it is beside the mark to say that the change is for the benefit of the owner. The Hanson Plan is not merely permissive; it does not enable the owner to choose for himself; but its avowed purpose is to embrace all unpaid assessments by the compelling force of law; and, therefore, the Hanson Plan is unlawful to the extent that it attempts to change the contracts which it made under the Bancroft Bonding Act and also those made under the charter concerning water-main assessments.

17. The changes worked by the Hanson Plan and of which Colby complains may be grouped into three classes: (1) Those which affect the number and

amount of the installments and time of payment; (2) those which act upon the mode and method of enforcing the collection of delinquent assessments; and (3) those which deal with the consequences of delinquency. Thus far we have considered only such changes as belong to the first group, and it yet remains to determine whether the changes belonging to the second and third groups impair the obligation of any contract.

18. The contract embraces only those stipulations which the parties have by their own hands written into it or which the invisible but omnipresent hand of the law has written into it. When seeking to ascertain what the parties have by their own hands written into the contract, it must be remembered that although a special benefit assessment is to be differentiated from a pure tax, nevertheless the power to assess is embraced in and its exercise is a manifestation of the power of taxation; and, therefore, when an assessment is levied on abutting property for a street improvement it constitutes an exercise of sovereignty; and, hence, when it is alleged that any part of the sovereign power to tax has been surrendered by force of a contract, the agreement must be clearly manifested: *Ladd* v. *Portland,* 32 Or. 271, 276, 279 (67 Am. St. Rep. 526, 51 Pac. 654). The contract between the owner of the Colby property and the city only speaks of the waiver of irregularities, the amount and number of the installments and the time of payment. A special benefit assessment is a proceeding *in invitum* and is not based upon a contract: *Brewster* v. *City of Syracuse,* 19 N. Y. 117. The assessment is a forced charge imposed upon the property by the sovereign power of the state and its validity does not depend upon any theory of contract between

the property owner and the public: 1 Page and Jones on Tax. by Assess., § 15. The Bancroft Bonding Act is framed upon the theory that the improvement, the apportionment and levy of assessments, and the collection of delinquencies are all governed and controlled by the city charter. When the assessment is apportioned and levied, the property owner can prevent the city from enforcing the immediate payment of the whole assessment, by invoking the restraining hand of the Bancroft Bonding Act and thereby divide the assessment into installments and extend the time of payment over a period of ten years; but if the owner permits an installment to become delinquent, the restraining hand of the statute is removed and the city is free to employ its own processes for the collection of whatever may be due: *Ladd* v. *Gambell,* 35 Or. 393, 398 (59 Pac. 113). The contract between the owner and the city only embraces two subjects: (1) Payment; and (2) waiver. Obviously the agreement concerning the time and manner of payment does not include the mode of compelling payment or the consequences of delinquency. When the owner contracts with reference to the waiver he concedes that an assessment is already levied on his property and then agrees that he will not claim that it is an invalid assessment. Manifestly, the stipulation relative to the waiver does not also embrace a covenant relative to the mode of enforcing the collection of an assessment or the consequences of a delinquency. The parties have not by their own hands written into their contract any stipulations about the method of compelling payment or the consequences of delinquency.

It must be remembered that the instant case is to be distinguished from adjudications which deal with the right of contractors who have performed work or the

rights of the holders of bonds issued on account of improvements. Colby occupies the position of one who owns property charged with an assessment and the obligation imposed upon him is to pay. If he fails to perform the obligation, the city has a right to compel him to perform it, and, when the city invokes whatever method that may be provided for enforcing payment, it is only availing itself of its remedy. Laws prescribing the procedure and method for collecting delinquent assessments are not contracts and may, therefore, be modified so long at least as the substantial rights of the owner are not violated: 1 Page and Jones on Tax. by Assess., §§ 15, 167; *Spokane* v. *Browne,* 8 Wash. 317 (36 Pac. 26); *Bate* v. *Sheets,* 64 Ind. 209, 212; 2 Page and Jones on Tax. by Assess., § 1113; *Essex Public Road Board* v. *Skinkle,* 140 U. S. 334, 340 (35 L. Ed. 446, 11 Sup. Ct. Rep. 790). In 1 Page and Jones on Tax. by Assess., § 170, we find this language:

"A property owner has no contractual right in the consequences which, by law, follow in case of his delinquency. Such consequences may therefore be changed by law, without impairing the obligation of contracts."

19. A contract had been let at a time when interest could not be charged on assessments, but before the assessment was levied the statute was modified so as to permit interest on assessments and it was held in *Dougherty* v. *Henarie,* 47 Cal. 9, that if the owner neglected to pay his assessment when it became due there was no constitutional objection to a statute charging interest after the assessment matured. In passing, it may be noted that when interest is charged on a delinquent tax it is not regarded as interest in the sense that it is a consideration for

the forbearance of money, but it is deemed to be a penalty; and when interest, so called, is charged, it is sustained on the theory that it is a means to insure prompt payment of the tax and it is not a part of the tax: *State* v. *Superior Court,* 93 Wash. 433 (161 Pac. 77). An assessment was levied at a time when the statute contained no provision for attorney's fee in case suit should be brought to enforce payment of the assessment. Afterwards a statute was passed allowing an attorney's fee as a part of the costs of suit and the court held, in *Dowell* v. *Talbot Paving Co.,* 138 Ind. 675 (38 N. E. 389), that the amendatory statute did not violate the obligations of any contract. The city has a right to change the remedy for the collection of delinquent assessments, and not even a contractor who has agreed to look to the assessments for his compensation can complain so long as the new is as efficacious as the old remedy, and much less can a property owner complain. Even though the owner is viewed as a party to a contract which creates a debt by assessment and provides for the time and amount to be paid, he nevertheless could not object to a more efficacious method of compelling him to do what he agreed to do, for as said by the Supreme Court of the United States in *New Orleans City & Lake R. R. Co.* v. *Louisiana ex rel. New Orleans,* 157 U. S. 219, 224 (39 L. Ed. 697, 15 Sup. Ct. Rep. 581):

"Modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. * * One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by

legislation that is designed only to enforce performance of his obligation."

The law did not write into the contract between the owner of the Colby property and the city a stipulation that a delinquent assessment could only be collected in the mode provided at the time the contract was made; nor did the law insert a covenant that the consequences of delinquency could not be changed; and, since the parties themselves did not contract about the mode of enforcing collections or concerning the consequences of delinquency and since the law did not introduce into the contract any stipulation upon those subjects, it necessarily follows that the contract clause of the Federal Constitution is not violated by the mere fact that the Hanson Plan provides for a different procedure or imposes new and added penalties. The procedure attempted to be provided for by the Hanson Plan contains some features which probably cannot be sustained on account of the fact that the power of the legal voters of Medford is limited to the enactment and amendment of their municipal charter and to the enactment of "local, special and *municipal* legislation." It will not be necessary to point out those objectionable features since they will become manifest upon the application of the doctrines announced in *West Linn* v. *Tufts,* 75 Or. 304 (146 Pac. 986); *State* v. *Port of Astoria,* 79 Or. 1 (154 Pac. 399); and *Rose* v. *Port of Portland,* 82 Or. 541 (162 Pac. 498).

20. The contention that Colby will be injured, if, at the sale of land for delinquent assessments, property is struck off to the city when there is no better offer to pay the full amount due, may be dismissed with the statement that it is competent to authorize a municipality to purchase in the absence of bidders, even

though the legislation conferring the authority is enacted after the assessment is made and before the sale: 2 Page and Jones on Tax. by Assess., § 1179; *City of New Whatcom* v. *Bellingham Bay Imp. Co.,* 16 Wash. 131 (47 Pac. 236); *Sutphin* v. *City of Trenton,* 31 N. J. Eq. 468.

21. The next contention made by Colby is that the levy of taxes for the purpose of paying interest on bonds in 1914, 1915 and 1916, and the payment of the taxes by the property owners, created a contract which obligates the city to waive the liens on property charged with special benefit assessments and to pay the entire indebtedness by general taxation. The right to tax does not grow out of nor does it depend upon a contract between the property owner and the state or its agency; and, hence, it cannot be successfully contended that the levy and collection of taxes for the purpose of paying interest in those three years created a contract. The special benefit assessments were not founded upon a contract, but they are referable to the power to tax and the levies made in 1914, 1915 and 1916, are likewise referable to the sovereign power of taxation.

22, 23. Proceeding with his contention, Colby insists that even though a contract was not created by the levy of taxes for the payment of interest on bonds, nevertheless it will be inequitable to enforce the collection of assessments, and that the city should therefore be obliged to pay the whole of the indebtedness by general taxation. The bonds issued under the Bancroft Bonding Act are general obligations of the city. There is no provision in the statute limiting the payment of the bonds to funds derived from special benefit assessments; but, on the contrary, a reading of the Bancroft Bonding Act makes it plain that the statute

contemplates that the bonds shall be regarded as liabilities of the city and that the city is obligated to pay the full amount of every bond without regard to whether the assessments have been or can be collected: *United States* v. *Fort Scott,* 99 U. S. 152 (25 L. Ed. 348). See also: *Mall* v. *Portland,* 35 Or. 89, 95 (56 Pac. 654); and *Stratton* v. *Oregon City,* 35 Or. 409, 415 (60 Pac. 905). It is true that the city did not attempt to enforce the collection of any assessments by selling the assessed property, but it is also true that according to the admitted facts the city could not have sold all the delinquent property for enough to satisfy the full amount of the delinquencies. The plaintiffs say in their printed brief that

"At least one third of the total cost of the pavement throughout said city will never be paid by the owners of the property before which such paving is laid, they preferring to forfeit to the city their property in all instances where said property is of less value than the cost of such improvement."

Laying aside the pessimistic views taken by the plaintiffs, it nevertheless plainly appears from the admitted facts that to have sold delinquent property in 1914, 1915 and 1916, would merely have postponed the necessity of resorting to general taxation, because it is conceded that a deficit will remain after the property of non-paying owners is sold for delinquent assessments and sooner or later this deficit must be satisfied with funds derived from general taxation. The plaintiffs do not claim that the charter does not confer the power of taxation upon the city, but every contention made by them proceeds upon the theory that the city has power to levy a general tax. As between the city and the holders of the Bancroft bonds, the bonds constituted obligations of the city, and when the city levied a general tax to pay

the interest on the outstanding bonds it did what in the very nature of things at some time would have been not only a right, but a duty, namely, the levy of a general tax to pay the debts of the city: Abbott on Public Securities, §§ 363, 364, 365 and 366. It is not necessary to decide whether the city could have been compelled to sell delinquent property before levying a general tax, for it is sufficient to say that the tax was levied and collected without any attempt to prevent it, and the property owners cannot now compel the city to waive its liens and pay all its indebtedness by general taxation. It would be an anomaly to say that the conduct of the municipal authorities constituted an election to waive the liens of special assessments when by levying a tax it merely did what it could be compelled to do after the liens are exhausted by full payment on the part of paying owners and partial payment by enforced sales of the property of nonpaying owners: Abbott on Public Securities, § 370.

24. Colby tendered the principal of the installment due on his property in 1914, but he refused to pay the interest on the theory that he had paid the interest by paying his taxes.

Taxes were levied on all taxable property in Medford, and out of these taxes the city paid the interest due on the outstanding bonds. It is true that when Colby paid his taxes the city used the money for the payment of interest due on bonds which the city had issued on account of the Colby assessment and also for the payment of interest due on bonds which the city had issued on account of assessments against the property of other persons; but it is also true that persons who had paid their assessments in full as well as owners of property which had never been charged with any local assessments were required to pay their

taxes and these taxes were used to pay the interest due on bonds, including the bonds which were issued on account of the Colby assessment. An owner whose property had never been charged with a local assessment could not have defeated the tax: *Durrett* v. *Davidson,* 122 Ky. 851 (93 S. W. 25, 8 L. R. A. (N. S.) 546); nor could the owner of property on Grape Street have avoided paying the tax by showing that he had fully paid the street assessment levied against his own property. Payment of the tax was not payment of any part of the assessment. When Colby paid his taxes he did exactly what every other property owner did. It might appear at first blush to be inequitable to require Colby to pay the tax and also the interest on the assessment, but upon further consideration it will become manifest that his position is not greatly different from the position of the owner of property on Grape Street who was obliged to pay his taxes notwithstanding the fact that he had already made full payment of the assessment levied against his property; and, moreover, it must be remembered that taxes were collected from every property owner in Medford and that consequently taxes collected from persons who owned property which had never been charged with a local assessment were used to pay interest on bonds, including the bonds issued on the Colby assessment. To relieve Colby from paying interest on his assessment would be to extend to him a favor not accorded to those who have paid both their taxes and their assessment. There are no equities exempting Colby from the payment of interest on his assessment.

25, 26. We have thus far considered and disposed of all the objections which Colby has urged against the Hanson Plan. There is yet another objection which must be noticed because it is necessarily in-

volved in this suit. The Bancroft Bonding Act was passed by the legislative assembly and it is a statute of state-wide application, for it embraces every city and town in the state. The amendments found in Article IV, Section 1a, and Article XI, Section 2, of the Constitution have not shorn the legislature of power to enact general laws concerning cities and towns: *Rose* v. *Port of Portland,* 82 Or. 541 (162 Pac. 498). Although passed prior to these two constitutional amendments, the Bancroft Bonding Act possesses just as much validity now as it did when originally enacted, for it governs, controls and dominates every incorporated city and town in Oregon. When a property owner brings himself within the Bancroft Bonding Act he puts into operation a state law which completely controls the city so long as the owner promptly pays his installments and interest. The city is utterly powerless to enact and enforce municipal legislation which overrides this state law. The Bancroft Bonding Act does not compel any owner to come within its embrace, but it merely holds out an offer which an owner may accept or decline as he chooses. The city can legislate concurrently on the same subject provided its legislation does not attempt to compel owners to come within its embrace. To illustrate: By the terms of the Bancroft Bonding Act the state offers to property owners a plan by which they may postpone the payment of assessments; the city can also devise and offer a plan for payment by installments to be accepted by the owner if he chooses, but the city cannot compel the owner to accept its plan, because the state law permits the owner, if he wishes, to accept the plan offered by the state. Again, the city can enact municipal legislation providing for a plan by which owners now within the Bancroft Bonding Act

may, if they choose, relinquish their rights under the state law and come within the embrace of the municipal plan; but the city is utterly powerless to compel a change. In its present form the Hanson Plan attempts by force of law to bring all assessed property within its embrace and it is therefore void to the extent that it attempts to operate upon property which has been brought under the protection of the Bancroft Bonding Act.

Our conclusions thus far expressed concerning the Hanson Plan may be summarized thus: As against applicants under the Bancroft Bonding Act and also as against applicants under the water-main provisions of the charter the Hanson Plan cannot be sustained because it attempts compulsorily to change the contract between the city and owners relative to the number and amount of installments and the time of payment; as against applicants under the Bancroft Bonding Act the Hanson Plan is void, because the attempted municipal legislation conflicts with the state legislation; but neither the contract nor the state law would be violated if the Hanson Plan were permissive instead of compulsory.

27. Stailey confines his complaint to an attack upon (1) the proceedings for the improvement of Grape Street and (2) the assessment proceedings. The charter of Medford authorized and empowered the council "to improve any street"; no improvement could be undertaken without posting and publishing notice for ten days of the intention of the council to order the improvement; after hearing all protests the council could

"notwithstanding said protests, if it deems the improvement of material benefit to the city, proceed to ascertain and determine the probable cost of making

such improvement, and assess upon each lot or part thereof adjacent to said improvement its proportionate share of the cost of said improvement."

The council had "full control of all streets" and could "order and prescribe the kind and character of all improvements" and could "prescribe the width" of the improvement "and the mode of construction" and could "compel the owners of the property abutting thereon or benefited thereby to pay the cost of such construction, improvement and repair, in such manner as the said council shall deem for the best interest of said city." The charter under which Medford was acting from 1907 to 1913 lacked many of the restrictions which are usually found in municipal charters. The power of the council was not dependent upon a petition of property owners; but the council acquired the right to pave a street by declaring its intention and by posting and publishing notice of its intention. Property owners had the privilege of protesting; but if the council deemed the proposed improvement of material benefit to the city it could make the improvement and assess the cost to the abutting owners "notwithstanding said protests." We have not discovered nor has our attention been called to a single provision in the charter requiring the council to give notice to bidders. The city was prohibited from entering into any contract except by ordinance, but this was the only express limitation upon the power of the council to contract; and, hence, after jurisdiction was acquired by adopting a resolution of intention and giving the required notice of intention to order an improvement, the council became vested with practically unlimited power to contract for the improvement.

On February 15, 1910, the council adopted a resolution to pave Grape Street from Sixth Street to Eighth

Street. Notice of this resolution was published but there is no proof of posting. On April 8, 1910, the council passed an ordinance authorizing a contract for the improvement of Grape Street from Sixth Street to Eighth Street to be made with the Clark & Henry Construction Company, and afterwards this contract was amended by an ordinance which was passed on July 19, 1910.

On February 23, 1910, a petition was filed asking that Grape Street be paved from Eighth Street south to the city limits. On March 3, 1910, a resolution of intention to pave Grape Street from Eighth Street south to the city limits was adopted and notices were posted and published. Subsequently on July 8, 1910, a second resolution of intention to improve was adopted, and while notice of this resolution was posted, there is no proof of its publication in any newspaper. On August 2, 1910, the council by ordinance authorized a contract for the improvement of Grape Street from Eighth Street to South City limits to be entered into with the Clark & Henry Construction Company.

On February 21, 1911, the council adopted a resolution of intention to pave Grape Street from Sixth Street to South City limits. There was both a posting and publication of notice that the council intended to order the improvement and that it would meet on March 7, 1911, at 7:30 P. M. and that all protests would be heard at that time. The council met on March 7, pursuant to notice, and after transacting some business adjourned to meet on March 8, 1911. The council met pursuant to adjournment and adopted a resolution ordering the improvement of Grape Street from Sixth Street to South City limits. On August 16,

1911, the council passed an ordinance which recites that the council

"finds that the special and peculiar benefit accruing upon each lot or part thereof adjacent to said improvement and in just proportion to benefits, to be the respective amounts hereinafter set opposite the number or description of each lot or part thereof, and such amounts respectively are hereby declared to be the proportionate share of each lot or part thereof, of the cost of such improvement. * * "

The Stailey property is included in this assessment ordinance.

The resolution of February 21, 1911, included all that part of Grape Street which was covered: (1) By the prior resolution of intention to pave from Sixth to Eighth; and (2) by the two prior resolutions of intention to pave from Eighth Street south to the city limits. Presumably the improvement was made by the Clark & Henry Construction Company on the faith of the two contracts which they had made under the two ordinances authorizing the city to contract for a pavement from Sixth Street to Eighth Street and from Eighth Street south to the city limits, for there is no affirmative statement that no other contract was made. The record does not disclose whether the work was actually done before or after the adoption of the last resolution. The resolution of February 21, 1911, was followed by the requisite posting and publication of notice and the council acquired full power to make the improvement from Sixth Street south to the city limits. The resolution of March 3, 1910, was also followed by the requisite posting and publication of notice and authorized the council to improve South Grape Street from Eighth Street south to the city limits; and even though the resolution of July 8, 1910, concerning that

part of South Grape Street lying between Eighth Street and the city limits was defective and even though the resolution of February 15, 1910, relating to the portion of Grape Street between Sixth and Eighth Streets was also defective, these two defective resolutions cannot invalidate the improvement and assessment proceedings when it appears from the record that by one resolution the council acquired jurisdiction to improve from Eighth Street south to the city limits and by another resolution acquired full power to improve from Sixth Street south to the city limits, when it appears that the work was actually done and the assessment made without any protest on the part of Stailey and when it further appears that he is chargeable with laches because he waited six years before protesting or attempting to defeat the assessment.

28. The objection that the resolution of February 21, 1911, was adopted without a petition signed by property owners comes to naught when it is remembered that the charter empowers the council to act without a petition.

Complaint is made because the record of the council meeting of March 7, 1911, does not disclose whether any protest was filed against the improvement. Although the council had ample power to order the improvement in despite of any remonstrance that may have been filed it will be assumed that the record must contain some recital showing whether a remonstrance was filed. The resolution of March 8, 1911, ordering the improvement of Grape Street from Sixth Street south to the city limits, refers to the resolution of intention and the giving of notice and then recites "whereas no protests were received against the same. * * " This affirmative finding is sufficient,

especially after a delay of six years. Again, the assessment ordinance of August 16, 1911, recites that:

"No protests having been filed against the improvement of Grape Street from Sixth Street to South City limits, due notice of the intention of the council to cause said improvement to be made having been given and said improvement having been ordered made. * * "

29. Stailey insists that the assessment should be annulled because the city permitted many owners to bring their property within the Bancroft Bonding Act when the actual value of their property was less than the amount of their assessment; but the answer to this objection is that the right to pay in installments depends upon whether the amount of the special benefit assessment is less than the valuation "as shown by the last tax-roll of the county," and it is conceded that every lot was valued on the tax-roll for more than the special benefit assessment levied against it.

30. It is now too late to object to the amount of the assessment against the Stailey property. The council levied the assessment after first finding "that the special and peculiar benefit accruing upon each lot * * and in just proportion to benefits" to be the amount so assessed. There is no charge of fraud. Stailey admits that his property has received some benefit from the improvement; and this admission coupled with the fact that there is no charge of fraud renders the finding of the council conclusive in this suit: *Paulson* v. *Portland,* 16 Or. 450, 460 (19 Pac. 450, 1 L. R. A. 673); *Masters* v. *Portland,* 24 Or. 161, 165 (33 Pac. 540); *Oregon & Cal. R. R. Co.* v. *Portland,* 25 Or. 229, 238 (35 Pac. 452, 22 L. R. A. 713); *Duniway* v. *Portland,* 47 Or. 103, 112 (81 Pac. 945); *Hughes* v. *Portland,* 53 Or. 370, 385 (100 Pac. 942); *Houck* v. *Roseburg,* 56 Or. 238, 244 (108 Pac. 186).

31. The decision of this court in *King* v. *Portland,* 38 Or. 402 (63 Pac. 2, 55 L. R. A. 812), affirmed by the United States Supreme Court in 184 U. S. 61 (46 L. Ed. 431, 22 Sup. Ct. Rep. 290), forecloses debate about the validity of the front-foot rule of assessment.

32. Another contention arises out of the fact that the cost of the street intersections was included in the assessment for the Grape Street improvement while the expense of paving the intersections in the Main Street and Oakdale Avenue improvements was paid by general taxation, with the result that owners of the property abutting on Grape Street paid all the expenses of paving the intersections in that street and at the same time helped to pay for the intersections in Main Street and Oakdale Avenue. The council had the power of exercising its discretion as to whether it would include or exclude the cost of street intersections when making the assessment; and when the council possesses this discretionary power it will not be prevented from levying special assessments for an improvement even though it has in the past paid for the same kind of improvement by general taxation: *Ladd* v. *Gambell,* 35 Or. 393, 400 (59 Pac. 113); *McChesney* v. *Chicago,* 152 Ill. 543 (38 N. E. 767); 1 Page and Jones on Tax. by Assess., §§ 236, 239, 317 and 440; 2 Page and Jones on Tax. by Assess., § 716. See also: *Durrett* v. *Davidson,* 122 Ky. 851 (93 S. W. 25, 8 L. R. A. (N. S.) 546).

The printed brief for the plaintiffs suggests several other objections, but it is sufficient to say that we have examined them and conclude that they are without merit. Stailey is not entitled to a cancellation of the assessments levied upon his property.

Although it may be assumed that the Hanson Plan would not violate any rights of owners who are neither within the protection of the Bancroft Bonding Act nor

within the protection of the city charter provisions concerning water-mains, yet the assessments which are protected by the charter and the Bancroft Bonding Act constitute such a large part of the total amount covered by the Hanson Plan and so materially enter into the very framework and purpose of the plan itself as to destroy the whole measure.

The Circuit Court correctly decreed that the proceedings for the improvement of Grape Street and for the assessment of the cost of the improvement were unassailable, and that the assessment against the Stailey property was a valid charge; and, therefore, this part of the decree is affirmed; but, for the reasons already stated, it was error to hold that the Hanson Plan was a valid amendment to the city charter, and consequently this part of the decree is reversed. The city is entitled to a judgment against Stailey for costs and disbursements while Colby is entitled to a judgment against the city for his costs and disbursements.

MODIFIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE BURNETT concur.

Argued September 12, affirmed September 19, 1917.

DAVIS LUMBER CO. *v.* COATS LUMBER CO.

(167 Pac. 507.)

Sales—Actions—Pleading—Performance.

1. Where a contract for the sale of lumber provided for part payment in advance, and excused default resulting from accident, etc., plaintiff's complaint, which did not aver performance on its part, or readiness to perform, is insufficient to state a cause of action, particularly where defendant attempted to excuse its nonperformance on

the ground of accident beyond its control; for in an action on a contract containing mutually dependent covenants plaintiff must allege full performance, or readiness and ability to perform, on his part, before he can put defendant in default and claim damages.

Sales—Performance—Complaint.

2. Where defendant by its answer sought to excuse nonperformance of a contract of sale, but did not repudiate it, the complaint, which failed to aver performance or readiness to perform by plaintiff, cannot be sustained on the theory that it was unnecessary for plaintiff to tender performance of a vain thing.

Appeal and Error—Objections in Lower Court—Complaint—Sufficiency.

3. The objection that a complaint does not state facts sufficient to constitute a cause of action is never waived, and may be raised for the first time in the Supreme Court.

Trial—Findings of Fact and Conclusions of Law—Necessity.

4. Where the complaint failed to state a cause of action, the court, under Section 79, L. O. L., declaring that, at any time when the pleadings are complete and either party fails or declines to plead further, judgment may be rendered on the pleadings, properly sustained defendant's motion for judgment without filing findings of fact or conclusions of law, despite Section 158, requiring that upon trial of an issue of fact by the court its decision shall be in writing and shall state the facts and conclusions of law separately.

From Tillamook: GEORGE R. BAGLEY, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

After stating the corporate character of the parties the complaint avers that the plaintiff and defendant entered into a contract, a copy of which is attached to the complaint, whereby the former agreed to purchase from the latter who promised to deliver to the former a certain amount of spruce lumber within ninety days from the date of the order at a fixed price mentioned. All this is admitted by the answer. Further proceeding, the plaintiff charges an utter refusal and neglect on the part of the defendant to furnish or deliver any of the lumber specified by the contract within ninety days or at any time. The initiatory pleading shows that about that time the plaintiff, depending upon its stipulation with the defendant, contracted to deliver to

a third party this same lumber and by reason of the default of the defendant was compelled to respond in damages to the concern to whom the lumber was ultimately to be furnished. The contract relied upon is in the form of an order signed by the plaintiff and directed to the defendant. Treating of the terms of payment it contains this provision:

"Terms of order 90% advance less 2% discount, etc."

The defendant denies the breach of the agreement charged against it. Further defending, the answer sets out a provision of the contract in these words:

"It is understood that this order is to be shipped promptly after acceptance; car shortage, accidents or delays beyond your control to be considered as reasonable excuse for delaying shipment; but in such event we are to be fully and promptly notified."

After stating this provision of the contract, the defendant avers in substance that, as the plaintiff well knew, the only source of supply which the defendant had for logs from which to manufacture lumber was from a boom company, and that the sole means of getting the logs was by floating them down a small stream into the Tillamook River, and thence to the defendant's mill at Tillamook City; that in order to make the small stream available for the purpose it was necessary to construct dams thereon without which it could not be used for the purpose, but that, without the fault of anyone, high water washed out one of the dams making it impossible for the logs to be delivered or for plaintiff entirely to fulfill the order, of all of which the plaintiff was promptly notified; that it was contemplated by the parties that the lumber should be manufactured at the defendant's mill in the usual course of business.

This is traversed by the reply. At a hearing the court entered a judgment in these words after a recital of the appearances:

"The court being fully advised in the premises does sustain defendant's motion for a judgment in its favor, there being no pleading or proof of plaintiff's ability or willingness to perform the contract sued on. It is by the court ordered and adjudged that plaintiff take nothing by this action, and the defendant have and recover of and from the plaintiff, its costs and disbursements herein taxed."

The plaintiff appeals. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Clark, Geneste & Harrison,* with an oral argument by *Mr. Virgil E. Clark.*

For respondent there was a brief and an oral argument by *Mr. H. T. Botts.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. There is no bill of exceptions in the record. The contention of the plaintiff is that the judgment is void because there were no findings of fact or conclusions of law. It is true that Section 158, L. O. L., requires that:

"Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk during the term or within twenty days thereafter. The decision shall state the facts found, and the conclusions of law separately, without argument or reason therefor. * * "

The section is applicable to a trial of an issue of fact and not where a mere issue of law is involved. It is said in Section 79, L. O. L.:

" * * and at any time when the pleadings in the suit or action are complete, or either party fails or declines to plead further, the court may, upon motion, grant to any party moving therefor, such judgment or decree as it may appear to the court the moving party is entitled to upon the pleadings."

The order of the court here in question recites that there is no pleading of plaintiff's ability or willingness to perform the contract sued upon. In the absence of a bill of exceptions and there being no findings of fact or conclusions of law within the meaning of Section 158, L. O. L., the question presented is whether the complaint states facts sufficient to constitute a cause of action. The contract involved is one prescribing what is to be done by the plaintiff and what by the defendant. These are at least concurrent covenants. Indeed, referring to the phrase already quoted, "Terms of Order, 90% advance," if it were necessary, it might well be decided that this was a condition precedent, so that the plaintiff would be compelled to pay 90% of the purchase price in advance of delivery of the lumber. Waiving this and considering the matter as one of mutual dependent covenants, however, it frequently has been held that in declaring upon such a contract the plaintiff must allege full performance or readiness and ability to perform on his part before he can put the defendant in default and claim damages as for a breach of the stipulation: *Catlin* v. *Jones,* 48 Or. 158 (85 Pac. 515); *Longfellow* v. *Huffman,* 49 Or. 486 (90 Pac. 907); *Mann* v. *Flynn,* 62 Or. 465 (125 Pac. 274). The complaint is utterly silent on this subject and does not anywhere state or attempt to state either performance by the plaintiff or its readiness or ability to comply with the stipulation on its part. It is not an instance of a lame statement of a wholly good cause

of action. The complaint is utterly mute in this essential particular.

The answer of the defendant does not indicate any repudiation of its agreement. It pleads an excuse for not performing and shows that it is yet within the pale of its covenant and has not broken it. The right to delay under the circumstances is as much a part of the contract as any other feature of it. This takes the case out of the doctrine announced in *Catlin* v. *Jones,* 48 Or. 158 (85 Pac. 515); to the effect that although the complaint is defective, yet if the matter in respect to which it is wanting is put in issue by the answer and reply the imperfection is cured. In that case the complaint was faulty in that it did not allege the readiness and ability of the plaintiff to perform, but the answer charged a breach of the contract by the plaintiff in this very respect, which was in turn challenged by the reply. The matter was therefore properly before the court for determination and the decision was put upon a proper basis and rightly rendered. Here, however, the defect in the complaint is not aided by the answer.

2. Neither is the case within the teaching of *Livesley* v. *Krebs Hop Co.,* 57 Or. 352, 367 (107 Pac. 460, 112 Pac. 1), to the effect that where the defendant has repudiated the contract it is not necessary for the plaintiff to tender performance as that would be a vain thing. As already indicated, the defendant here is not in the position of renouncing the contract or refusing to perform. The answer only avers a stipulated excuse for not delivering the lumber and is in accordance with the covenant rather than in breach thereof.

3, 4. The objection that the complaint does not state facts sufficient to constitute a cause of action is never

waived and may be raised even for the first time in the Supreme Court: *Mack* v. *City of Salem,* 6 Or. 275; *Wyatt* v. *Henderson,* 31 Or. 48 (48 Pac. 790); *Robinson* v. *Holmes,* 57 Or. 5 (109 Pac. 754); *Whitney Co.* v. *Smith,* 63 Or. 187 (126 Pac. 1000). The ruling of the court is justified by the provisions of Section 79, L. O. L., as a question of judgment on the pleadings involving merely an issue of law. For this reason it was not necessary to make findings of fact or conclusions of law, because no question of fact was involved. It is purely a question of pleading, hence the judgment must be affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued September 12, reversed September 19, 1917.

CHRUDINSKY *v.* EVANS.

(167 Pac. 562.)

Trial—Argument—Statement of Counsel.

1. Allowing counsel for plaintiff, in action for damages for fraud inducing a purchase, to state that plaintiff offers to take a certain sum and return the property, giving defendant till the next morning to accept, is error; it injecting a spurious issue, and also amounting to a self-serving declaration that plaintiff is disposed to compromise.

[As to misconduct of counsel in argument that calls for new trial, see note in 9 **Am. St. Rep.** 559.]

Appeal and Error—Review—Necessity of Bill of Exceptions.

2. For review of the entry of a separate judgment on the separate verdict against defendants, sued as joint tort-feasors, bill of exceptions is not necessary; Section 172, L. O. L., providing that no exception need be taken to a decision on a matter of law, when it is entered in the journal, or made wholly on matters in writing and on file in the court.

Trial—Verdict—Apportioning Damages.

3. In the absence of statutory authority, the jury may not apportion damages against defendants, sued as joint tort-feasors.

Trial—Verdict—Action for Joint Tort.

4. Section 180, L. O. L., authorizing judgment for or against one or more of several plaintiffs or defendants, does not allow of verdict and judgment in different amounts against defendants, sued as joint tort-feasors.

Appeal and Error—Action for Joint Tort—Verdict—Right to Complain.

5. Defendants, sued as joint tort-feasors, and not merely plaintiff, may complain of verdict and judgment against defendants in different amounts.

From Multnomah: HENRY E. MCGINN, Judge.

Department 2. Statement by MR. JUSTICE BURNETT.

This is an action to recover damages from the defendants on account of fraud which plaintiff alleges they perpetrated upon her, whereby they induced her to purchase the lease and furniture of an apartment house in Portland at much more than its real value.

The separate answers of the defendants traverse all the averments of the complaint charging fraud. The jury returned two verdicts for the plaintiff, one against the defendant Evans in the sum of $250 and another against the defendant Lent for $1,150. A judgment was rendered accordingly and the defendant Lent appeals. REVERSED.

For appellant there was a brief over the names of *Mr. Isham N. Smith* and *Mr. John F. Logan,* with an oral argument by *Mr. Smith.*

For respondent, Josephine L. Chrudinsky, there was a brief over the names of *Mr. Walter G. Hayes* and *Messrs. Clark, Skulason & Clark,* with an oral argument by *Mr. Alfred E. Clark.*

For respondent, Monemia Evans, there was a brief over the name of *Messrs. Westbrook & Westbrook.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. The defendant complains that during the argument to the jury plaintiff's counsel stated:

"The plaintiff now offers to take a thousand dollars and return to the defendant the property. Now, see if they will take up our offer and we will give them until to-morrow morning to come into court and accept the offer."

The court overruled the objection of counsel for the defendant Lent to this argument, refused to withdraw the matter from the jury, and she excepted. This was error because the remark attempted to inject into the case a spurious issue and tended to divert the minds of the jurors from the question they were called upon to try. The present action is not one for rescission of the contract, but to recover damages for fraud inducing the same. The theory of the case is that the plaintiff elects to retain the property but to recover damages, while the argument offered proceeded upon the hypothesis that the covenant was to be rescinded and the property returned. The utterance of the attorney also amounted to a gratuitous self-serving declaration that his client was disposed to compromise and was calculated to influence the jury by irrelevant matter.

It is also assigned as error that the court did not give to the jury an instruction submitted by the defendant Lent describing the elements of actionable fraud; but an examination of the charge given shows that all these elements were carefully and lucidly explained to the jury in substance the same as requested.

2. The principal error relied upon by the appealing defendant is the entry of a separate judgment on the several verdicts. For one thing, in opposition to this, the plaintiff contends that the defendant cannot be heard here on that point because there is nothing about it in the bill of exceptions. We read, however, in Section 172, L. O. L.:

"No exception need be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon matters in writing and on file in the court."

An exception is an objection and a bill of exceptions is necessary only where the matter to which it applies does not otherwise appear of record. Here, however, the decision complained of was made upon these written verdicts which were filed, and was embodied in an entry upon the journal of the court. Hence there was no need of duplicating the history of the transaction impugned.

3. It is well settled by the great weight of authority that in the absence of a statute authorizing an apportionment of damages among joint tort-feasors, the jurors have no right to divide them and assess a portion to each defendant thus concerned in the perpetration of a common wrong: *Nashville Ry. etc. Co.* v. *Trawick,* 118 Tenn. 273 (99 S. W. 695, 121 Am. St. Rep. 996, 12 Ann. Cas. 532, 10 L. R. A. (N. S.) 191); *Railroad* v. *Jones,* 100 Tenn. 512 (45 S. W. 681); *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534, 553 (43 L. Ed. 543, 19 Sup. Ct. Rep. 296); *Hunter* v. *Wakefield,* 97 Ga. 543 (25 S. E. 347, 54 Am. St. Rep. 438); *City of Birmingham* v. *Hawkins* (Ala.), 72 South. 25; *Glore* v. *Akin,* 131 Ga. 481 (62 S. E. 580); *Lynch* v. *Chicago,* 152 Ill. App. 160; *Young* v. *Aylesworth,* 35 R. I. 259, 86 Atl. 555; *Foy* v. *Barry,* 159 App. Div. 749 (144 N. Y.

Supp. 971); *McCool* v. *Mahoney,* 54 Cal. 491. The contrary doctrine appears to be supported by some Kentucky cases, notably, *Louisville etc. Co.* v. *Roth,* 130 Ky. 759 (114 S. W. 264), and *Cincinnati etc. Ry. Co.* v. *McElroy,* 146 Ky. 668 (142 S. W. 1009), but they depend upon a special statute of that state (Section 12, Kentucky Statutes) expressly allowing the jury to assess several or joint damages against several defendants in trespass. The plaintiff relies upon the case of *Rathbone* v. *Detroit United Ry. Co.,* 187 Mich. 586 (154 N. W. 143). There the complaining party was a passenger on the train of the Detroit United Railway which collided with some of the vehicles of The Good Roads Construction Company. He sued both companies. The verdict was for the plaintiff in the sum of $10,000, against the railway company for $6,000, and against the construction company for $4,000. The majority of the court held that the apportionment could not be regarded as surplusage and that the verdict should not have been received nor judgment rendered thereon; while the minority urged that the apportionment could be rejected as surplusage and that the verdict should stand as one for $10,000 against both defendants. Each opinion is against the doctrine that the jury has a right to apportion damages against joint tort-feasors who are included in the same charge as such. The only point of difference between the judges was whether the apportionment could be rejected as surplusage and the remainder of the verdict allowed to stand.

4, 5. It is true that Section 180, L. O. L., says:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves."

This statute is designed to remedy the evil that resulted from the old rule laid down by some authorities that if a plaintiff charged two defendants jointly, he must prove his case against both of them and must suffer complete defeat if he only sustained the charge against one. Under this enactment as applied to the present litigation, if the plaintiff had utterly failed to make a case against the defendant Evans yet proved her allegations against the defendant Lent, a verdict could have been returned in favor of Miss Evans and another for a stated amount of damages against Mrs. Lent, and judgment could thus have been rendered for Miss Evans and against Mrs. Lent. This section, however, does not authorize the entry of one judgment against one wrongdoer and another against the other where they are sued jointly. There are cases like *Jones* v. *Grimmet,* 4 W. Va. 104, *Crawford* v. *Morris,* 5 Gratt. (Va.) 90, and *Hooks* v. *Vet,* 192 Fed. 314 (113 C. C. A. 526), which hold that only the plaintiff can complain of such a verdict; and *Nashville etc. Co.* v. *Trawick,* 118 Tenn. 273 (99 S. W. 695, 121 Am. St. Rep. 996, 12 Ann. Cas. 532, 10 L. R. A. (N. S.) 191, which points out how the matter might have been remedied at *nisi prius.* A controlling precedent on this subject, however, is found in *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 553 (43 L. Ed. 543, 19 Sup. Ct. Rep. 296), where the court ruled that on account of the possible injustice that might be done to an appellant such judgments should be reversed for a new trial. The doctrine is peculiarly applicable to the instant contention for there is neither allegation nor proof that one defendant was more to blame than the other in the transaction in question.

A verdict is a declaration of the truth of the matter in controversy. It should correspond to the issue as

laid. If the defendants are charged as joint tort-feasors and both are found liable, the jury has no right to sever them and treat the case in their verdict as if a separate action had been instituted against each defendant.

Our statute provides in Sections 150 and 151, L. O. L.:

"If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

"When the verdict is given, and is such as the court may receive, and if no juror disagree, or the jury be not again sent out, the clerk shall file the verdict."

This is the appropriate procedure to be followed in such a case. The court was in error in disregarding it and allowing the double-headed verdict to be filed. The plaintiff had at hand a statutory remedy to obviate the mistake of the jury but did not exercise it.

The other assignments of error are not important. The judgment was plainly erroneous in the respects mentioned and must be reversed. REVERSED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE MCCAMANT concur.

Argued September 7, reversed and remanded September 19, 1917.

JONES v. SKILES.

(167 Pac. 505.)

Pleading—Demurrer—Assumption of Fact.

1. On a demurrer to a complaint, the allegations in the complaint must be assumed to be true.

Partnership—Accounting—Cross-bill.

2. In a law action on notes, where liability is so inextricably involved with a partnership transaction that nothing short of an ac-

counting could furnish data necessary to determine the issues of the action, a cross-bill in equity for an accounting is proper.

[As to nature and object of cross-bills, see note in 83 Am. Dec. 251.]

From Marion: WILLIAM GALLOWAY, Judge

J. C. Jones filed in the Circuit Court of Marion County, Oregon, Department No. 2, a cross-bill in equity against G. W. Skiles and M. N. Lewis. Defendants interposed a demurrer and the same having been sustained, plaintiff appeals. Reversed and remanded.

Department 1. Statement by MR. JUSTICE BENSON.

This is an appeal from the order of the trial court sustaining a demurrer to a cross-bill in equity. The facts as gleaned from the complaint are as follows: On June 3, 1913, plaintiff was the owner of a business in Forest Grove, which consisted of stonecutting and the manufacture of monuments. On that day the defendant Lewis entered into a written agreement of partnership with plaintiff whereby he purchased a half interest in such business, agreeing to pay therefor the sum of $3,302.19, which obligation was evidenced by six promissory notes, payable at various intervals, the last of which would mature on June 3, 1916. It was further stipulated that in the meanwhile they should jointly conduct the business, sharing equally in both profits and losses, and that when all the notes above referred to were paid plaintiff would execute to defendant Lewis a good and sufficient bill of sale of such half interest in the business. After a time they moved the business to Salem. On November 7, 1913, plaintiff, at the suggestion of Lewis, purchased certain real estate in Salem, as a location for the business, paying $566.67 in cash and entering into a contract with the owner in regard to deferred payments, this contract being in

the joint names of Jones and Lewis. The total purchase price of this property was $1,700, all of which was finally paid by the plaintiff and out of the business. At the time the partnership was undertaken, the defendant Skiles was in the employ of the firm and so continued until June 12, 1915, when Jones discharged him. Lewis protested against this act and said that if Skiles was discharged he would withdraw from the business and proposed to sell his interest therein to Jones. Prior to this time the partners had executed their joint notes to a bank at Forest Grove for an amount aggregating $2,000, and had turned over to the bank, as collateral, the notes executed by Lewis at the inception of the partnership. It is alleged that Jones has but little education, is ignorant of bookkeeping, and trusted Lewis to act as accountant for the firm; that on August 2, 1915, the date of the alleged sale of Lewis' interest to Jones, the former informed plaintiff that the total assets of the firm were $13,265.09 and the liabilities $9,477.17, and further represented the profits of the business to be an amount grossly in excess of their true value. These representations were false, and known by Lewis to be false, and were made for the purpose of deceiving and defrauding plaintiff into purchasing from Lewis his interest in the business when, in fact, he had no valuable interest therein, since no part of the purchase price notes had been paid by him and he had already withdrawn considerable sums of money for his own use. In reliance upon these false representations, plaintiff entered into an agreement which reads thus:

"This agreement made in duplicate the 2nd day of August, 1915, by and between M. N. Lewis of Salem, Oregon, hereinafter called the 'seller,' and J. C. Jones of the same place, hereinafter called the 'buyer.'

"WITNESSETH: That said seller agrees to and does hereby sell and transfer unto said buyer all his interest in the Capital Monument Works, located at Salem, Oregon, including the physical properties, book accounts, contracts and good-will of said business conducted under the name of Capital Monument Works, for the consideration of $1000.00, to be paid in the manner and at the time hereinafter specified: $100.00 in cash; $100.00 in sixty days; $100.00 in ninety days; $200.00 in six months and $500.00 in one year. All deferred payments to draw interest at the rate of six per cent. per annum until paid. Said indebtedness being evidenced by promissory notes signed by said buyer.

"In consideration of said sale said buyer agrees to assume all obligations outstanding against said business conducted under the name of the Capital Monument Works, and which was a part of said partnership.

"Further, it is understood that the seller's title in said property and business shall be retained by him until the purchase price of $1000.00 and interest is fully paid and until said seller is released from any liability on account of four promissory notes, aggregating $2000.00, payable to the First National Bank of Forest Grove, Oregon, as well as certain promissory notes heretofore given by the seller to the buyer and now hypothecated with said bank as security to insure the payment of said four promissory notes, aggregating $2000.00.

"It is a provision of this agreement, and it is mutually agreed that said seller shall remain in the employ of said Capital Monument Works in the capacity of traveling salesman having for his duties the selling of monuments, and shall remain in such employment until released from any legal liability on account of said four notes given to the First National Bank of Forest Grove, and such further time as is mutually agreeable to the parties to this contract.

"In consideration of such services said buyer agrees to pay said seller one-half of all the profits realized from sales made by said seller, to be paid to said seller

whensoever the purchase price for said monument has been paid."

It is averred that all these wrongful acts and others which are set out in the cross-bill were part of a conspiracy between Lewis and Skiles to secure for their own use and without consideration, plaintiff's business; that in pursuance of such collusion and conspiracy Lewis assigned to Skiles three of the four notes mentioned in the contract of sale above set out, and had begun actions at law to recover thereon from plaintiff; and that Skiles took the notes with full knowledge of the fraud and with full knowledge of all the defenses thereto and paid nothing for them. It is further alleged that Lewis did not keep true and correct accounts of the transactions of the firm, and plaintiff is still unable to obtain a true statement of its affairs at the time of the alleged sale on August 2, 1916. In October, 1915, Skiles and L. J. Lewis, the wife of defendant Lewis, established a similar business at Beaverton with defendant Lewis acting as manager and since then have, as far as possible, diverted all business away from plaintiff to their own plant. It is also asserted that at the time of the alleged sale to Jones, Lewis had in his possession designs, samples and personal property belonging to plaintiff which he refuses to return and which have since been in use by defendants. Plaintiff having made final payment upon the real estate heretofore mentioned, has been unable to obtain a deed thereto because Lewis refuses to quitclaim the same. Lewis still claims an interest in plaintiff's business by reason of the unpaid notes, but has done nothing in support or aid thereof. It is also alleged that Lewis is insolvent. The prayer is for an accounting of the partnership affairs; that plaintiff be decreed to be the exclusive owner of the business; that the con-

tract of sale to Lewis be canceled; that the actions upon plaintiff's notes be perpetually enjoined; and that plaintiff have judgment for the amount of the promissory notes given by Lewis in payment for his partnership in the business and for general relief.

REVERSED AND REMANDED.

For appellant there was a brief and an oral argument by *Mr. Robert C. Wright.*

For respondents there was a brief over the names of *Mr. Everil M. Page* and *Messrs. McNary & McNary,* with an oral argument by *Mr. Page.*

MR. JUSTICE BENSON delivered the opinion of the court.

1, 2. The foregoing statement does not include all the allegations found in the complaint, but enough has been set out to show that plaintiff's liability upon the promissory notes sued upon in the actions at law is so inextricably involved with the partnership transactions that assuming these allegations to be true, as we must upon demurrer, nothing short of an accounting of such partnership business could furnish the data necessary to justly determine the issues of the actions at law. It is quite true as said by this court in *Dose* v. *Beatie,* 62 Or. 308, 316 (123 Pac. 383, 125 Pac. 277), that:

"When in a law action the defendant can legally set forth the facts constituting his entire defense, his answer is adequate, and there is no necessity for a resort to a suit in equity in the nature of a cross-bill."

But along with this statement there runs another, equally important, which is well expressed in *Tooze* v. *Heighton,* 79 Or. 545, 554 (156 Pac. 245), as follows:

"If, however, the defense available at law is not as plain, adequate, complete, practical and efficient as a defense on the same facts in a court of equity, a cross-bill may be interposed."

The cross-bill in the present case alleges facts constituting a partnership, alleges fraud and conspiracy to wrong plaintiff, and alleges facts tending to show that the notes in question are a part of these involved transactions. We think, therefore, that the trial court erred in sustaining the demurrer. The decree is reversed and the cause remanded with directions to overrule the demurrer. REVERSED AND REMANDED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BURNETT and MR. JUSTICE HARRIS concur.

Argued September 13, affirmed September 19, 1917.

DEMPSEY *v.* BALL.*

(167 Pac. 508.)

Fraudulent Conveyances—Pending Suit—Intent—Knowledge.

1. In an action involving a mortgage executed pending a suit for damages, evidence *held* not to show that the mortgagee had knowledge or notice of a fraudulent intent of the mortgagor to defraud or delay collection of the possible damages.

Fraudulent Conveyances—Evidence—Presumptions.

2. Fraud against a mortgagor's creditors is not presumed, but must be shown by satisfactory evidence, which may be circumstantial.

[As to proof of fraud in fraudulent conveyances, see note in 11 **Am. St. Rep.** 757.]

Evidence—Admissions—Mortgagee.

3. Although default by mortgagor in a suit to foreclose is an admission on the part of the mortgagor of fraudulent intent to defraud or delay collection by a judgment creditor, it does not bind the mortgagee.

*For authorities discussing the question as to whether a mortgage for an actual contemporaneous loan may be set aside as fraudulent as against creditors, see note in 26 **L. R. A. (N. S.)** 1068. REPORTER.

From Multnomah: HENRY E. MCGINN, Judge.

This is a suit by D. J. Dempsey against R. L. Ball, Henrietta Ball, George C. Engelke and Henry Zorn in which the trial court made findings and entered a decree in favor of plaintiff, from which the defendant Zorn appealed. Affirmed.

Department 2. Statement by MR. CHIEF JUSTICE MCBRIDE.

This was originally a suit by plaintiff to foreclose a mortgage given by the defendants Ball and wife and Engelke to plaintiff upon land in Multnomah County, of which defendant Zorn claims to be the owner by virtue of a sheriff's sale made subsequently to the execution of plaintiff's mortgage. The defendants Ball and wife and Engelke made default, and Zorn answered by a general denial, and by way of affirmative defense and cross-complaint alleged that on June 25, 1914, he recovered a judgment against Engelke for $2,500 and costs; that on July 13, 1914, execution was issued upon said judgment and the land described in the complaint was sold upon said execution and purchased by Zorn for the sum of $300; that after the commencement of the action of Zorn against Engelke said Engelke, without consideration and for the purpose of hindering, delaying, and defrauding his creditors, and particularly Zorn, conveyed the property to defendants Ball and wife by a warranty deed, recorded December 12, 1913; that on April 20, 1914, the defendants Engelke and Ball and wife in anticipation of there being a judgment rendered in the action herein described and for the purpose of making plaintiff Dempsey a preferred creditor, and for the fraudulent purpose of hindering, delaying, and defrauding their creditors,

and for the express purpose of defeating any judgment which might be rendered in the action of *Zorn* v. *Engelke,* fraudulently executed the mortgages described in plaintiff's complaint; that Dempsey and Ball and wife all knew and had notice of the pendency of the said action and knew of the fraudulent intent of Engelke to defraud Zorn and his other creditors, and that the said mortgage was purely voluntary and made solely with such fraudulent intent. The matter in the cross-complaint having been put in issue by appropriate denials there was a trial and findings and decree for plaintiff, from which defendant Zorn appeals.

For appellant there was a brief with oral arguments by *Mr. Charles J. Schnabel* and *Mr. G. E. Hamaker.*

For respondent there was a brief over the name of *Messrs. Woerndle & Haas,* with an oral argument by *Mr. C. T. Haas.*

Opinion by MR. CHIEF JUSTICE MCBRIDE.

1, 2. A brief history of this case is as follows: On October 14, 1913, the defendant Zorn commenced an action against Engelke in the Circuit Court for Multnomah County to recover $20,000 damages for an alleged vicious assault made upon him, and at a date not disclosed in the record, but probably about contemporaneous with the civil action, Engelke was indicted for the same assault and required to furnish bail in the sum of $2,500. He applied to his brother-in-law Ball to become surety upon the undertaking of bail, but Ball objected for the reason that he did not have sufficient property exempt from execution to enable him to justify as a surety. To overcome this objection Engelke conveyed to Ball and wife the land in suit, and they became his sureties. The criminal case is still

untried and pending. On February 10, 1914, the civil action for damages was tried, and a verdict and judgment rendered against Engelke in the sum of $750. On March 28th this verdict and judgment were set aside and a new trial granted. On April 20th the mortgage in suit was executed. W. T. Hume, Esq., was attorney for Engelke up to the time the judgment was rendered, but thereafter he was discharged, and Woerndle & Haas, his present attorneys, were substituted. Engelke had given Hume a note for $500 for attorneys' fees, and previous to the execution of the note and mortgage in suit the assignee of this note was pressing for payment and threatening suit. Engelke represented to his attorneys that he needed money to pay this note and other indebtedness, and they applied to plaintiff, who had been a client of theirs in making other loans. It is conceded that they told him nothing and that he knew nothing of Engelke's difficulties or lawsuits, but that after investigation he consented to make the loan and authorized Woerndle & Haas to look up the title and prepare the papers, and when this was done gave them a check for $1,200, the amount of the note and mortgage. It is shown that they deducted from this amount their commission for procuring the loan and paid the balance over to Engelke. The property is said to have been worth something over $3,500, and Engelke had other property, one piece of which defendant bid in at sheriff's sale at $2,300. There is not sufficient evidence to warrant the court in finding that Woerndle & Haas had notice or knowledge that Engelke was borrowing this money and executing this mortgage for the purpose of defrauding his creditors or defeating any judgment that Zorn might recover against him. A verdict of $750 had previously been set aside, and it is natural to presume that Engelke would not have

asked that this be done except from a belief that another trial would result in a verdict against him for a smaller amount, or in his favor, and it is hardly conceivable that under the circumstances he would jeopardize his property or place a burden upon it unless he actually needed the money; and it is apparent that with the Hume note being pressed and a civil suit to be retried $1,200 was not an exorbitant sum for his immediate needs. Fraud is not to be presumed, but must be proved by satisfactory evidence, and while that evidence may be circumstantial it should still be satisfactory; and such is not the case here.

3. It is urged that the fact that Engelke and Ball and his wife have made default is an admission by them that the loan was procured with the fraudulent intent claimed in the complaint. As between Zorn and Engelke and Bell and wife this is technically true, but this admission does not bind the plaintiff or estop him from showing the real facts in the case. It is not in the power of Engelke to get $1,200 of plaintiff's hard-earned money, give a mortgage for its repayment, and by failure to answer make the mortgaged premises do double duty by being applied to the payment of his debt to Zorn. He cannot admit the plaintiff out of court or make evidence against him by failure to answer the complaint, and while the language used by Mr. Justice STRAHAN, in *Philbrick* v. *O'Connor*, 15 Or. 15 (13 Pac. 612, 3 Am. St. Rep. 139), is not so clear as it might be, it is quite certain that no such interpretation as counsel for defendant puts upon it was intended by the learned jurist who wrote that opinion. There were many badges of fraud in that case that do not exist here, such as inadequacy of the price paid for the property, poverty of the alleged purchaser, and knowledge of the fact that a suit was pending; but in the face of all these

the court required the amount that the purchaser had paid for the property to be first paid to him and out of the proceeds of the sale of the property before giving the execution creditor any relief.

We are not convinced by the preponderance of the evidence that either the plaintiff or his attorneys knew or had notice of any fraudulent intent on the part of Engelke to defraud or delay Zorn in the collection of any possible damages he might recover. On the contrary we are of the opinion that they believed that the money was being borrowed for a legitimate purpose. That Engelke may have changed his attitude when, perhaps to his surprise, a second jury returned a verdict twice as large as that given by the first is not to be charged against plaintiff, who in good faith parted with his money.

The decree is affirmed. AFFIRMED.

MR. JUSTICE MOORE, MR. JUSTICE MCCAMANT, and MR. JUSTICE HARRIS concur; MR. JUSTICE BEAN taking no part in the consideration of this case.

Argued June 20, affirmed July 10, rehearing denied September 25, 1917.

STATE v. WILBUR.*

(166 Pac. 51; 167 Pac. 569.)

Indictment and Information—Illegal Sale of Liquor—Constitutional Requirement.

1. An indictment for illegally selling intoxicants, which, as permitted by Laws of 1915, page 166, Section 33, did not name the purchaser, was sufficient, and the indictment and statute did not violate Article I, Section 11, of the Constitution, declaring that accused shall have the right to demand the nature and cause of the accusation.

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*As to whether indictment or information for unlawful sale of intoxicating liquors must state name of person to whom sale is made, see note in 23 **L. R. A. (N. S.)** 581. REPORTER.

Intoxicating Liquors—Illegal Sale by Agent—Consent of Defendant—Statute.

2. Under Laws of 1913, page 410, providing that in all prosecutions for an alleged illegal sale of intoxicants it is not necessary to show the knowledge of the principal to convict him for the acts of his agent or servant, unrepealed by Laws of 1915, page 170, Section 41, relating to intoxicants, and repealing only such prior enactments as were in conflict, in a prosecution for illegally selling intoxicants, the court properly charged that defendant was guilty if the sale was actually made by his employee, even if without his consent.

[As to liability of licensee for illegal sale of liquor by his agent or servant against instructions, see note in Ann. Cas. 1912A, 1199.]

Criminal Law—Former Conviction—Pleading—Bar.

3. Where the state elected to try its prosecution for illegally selling intoxicants as for an unlawful sale to a particular person, the choice, being properly induced, having been made a matter of public record, the conviction can be pleaded in bar to any further prosecution for a sale on such occasion to such person.

ON PETITION FOR REHEARING.

Indictment and Information—Constitutional Requirements—Intoxicating Liquors.

4. Laws of 1915, page 166, Section 33, known as the Prohibition Act, and providing that the indictment need not state the name of the person by whom or to whom the liquor was sold, does not violate the Sixth Amendment of the United States Constitution, providing that the accused shall be informed of the nature of the cause of the accusation.

Constitutional Law — Indictment and Information — Intoxicating Liquors—Constitutional Requirements.

5. Neither does such act violate the Fourteenth Amendment providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

From Clackamas: JAMES U. CAMPBELL, Judge.

Department 2. Statement by MR. JUSTICE MOORE.

The defendant was accused by an indictment the charging part of which reads:

"The said Julius Wilbur, on the 23d day of September, A. D. 1916, in the county of Clackamas and state of Oregon, then and there being did then and there unlawfully sell intoxicating liquor, contrary to

the statute in such cases made and provided, and against the peace and dignity of the state of Oregon."

A demurrer was interposed thereto on the ground *inter alia* that the indictment did not inform the defendant of the nature and cause of the accusation against him. The demurrer was overruled, whereupon the defendant entered a plea of not guilty, and a trial being had he was convicted and appeals from the resulting judgment. AFFIRMED.

For appellant there was a brief over the name of *Messrs. Fulton & Bowerman,* with an oral argument by *Mr. Charles W. Fulton.*

For the State there was a brief with oral arguments by *Mr. George M. Brown,* Attorney General, and *Mr. Gilbert L. Hedges,* District Attorney.

MR. JUSTICE MOORE delivered the opinion of the court.

Section 33 of Chapter 141, Gen. Laws 1915, prohibiting in Oregon the manufacture, sale, or barter of intoxicating liquors, except as stated in the enactment, is as follows:

"In prosecutions under this act, whether begun by indictment, complaint, or information, it shall not be necessary to state the kind or quantity of liquor manufactured or sold, and it shall not be necessary to describe the place where the same was manufactured or sold, except in prosecutions for the keeping and maintaining of a common nuisance as defined by this act, or when a lien is sought to be established against the place where such liquor was illegally sold; and it shall not be necessary to state the name of the person by whom the same was manufactured or sold, nor to state the name of the person to whom the same was sold;

and it shall not be necessary in the first instance, for the state to allege or prove that the party charged did not have legal authority to sell such liquor, or was not within any of the exceptions provided by this act."

It is contended by defendant's counsel that though the indictment complies with the clause of the statute quoted that enactment and the formal charge founded thereon violate Section 11 of Article I of the Constitution of Oregon, which declares:

"In all criminal prosecutions the accused shall have the right * * to demand the nature and cause of the accusation against him";

and such being the case an error was committed in overruling the demurrer. In *State* v. *Shaw,* 22 Or. 287, 290 (29 Pac. 1028), Mr. Justice BEAN, in speaking of the sufficiency of an accusation, observes:

"The indictment is in the language of the statute; and it is the settled rule in this state that in indictments for misdemeanors, created by statute, it is sufficient to charge the offense in the words of the statute, subject to the qualification that the crime must be set forth with such certainty as will apprise the accused of the offense imputed to him."

In addition to the cases cited as supporting the language thus quoted see also: *State* v. *Koshland,* 25 Or. 178 (35 Pac. 32); *State* v. *Carmody,* 50 Or. 1 (91 Pac. 446, 1081, 12 L. R. A. (N. S.) 828); *State* v. *Miller,* 54 Or. 381 (103 Pac. 519); *State* v. *Edmunds,* 55 Or. 236 (104 Pac. 430); *State* v. *Billups,* 63 Or. 277 (127 Pac. 686, 48 L. R. A. (N. S.) 308); *State* v. *Scott,* 63 Or. 444 (128 Pac. 441); *State* v. *Underwood,* 79 Or. 338 (155 Pac. 194); *State* v. *Mishler,* 81 Or. 548 (160 Pac. 382).

In *Coleman* v. *State,* 150 Ala. 64 (43 South. 715), it was held that a statute of Alabama authorizing the

form of an indictment charging an illegal sale of intoxicating liquor and dispensing with an averment of the name of the person to whom the alleged sale was made did not violate the Constitution of that state, which granted to a defendant in a criminal action the right to be informed of the nature and cause of the accusation against him. The same conclusion was reached in the case of *Jones* v. *State,* 136 Ala. 118, 123 (34 South. 236). In *People* v. *McBride,* 234 Ill. 146, 170 (84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994), it was ruled that a statute of Illinois making it unnecessary to name in an information the person to whom intoxicating liquor is alleged to have been illegally sold, did not violate the organic law of that state in not informing the accused of the nature of the charge against him. So, too, in *State* v. *Schweiter,* 27 Kan. 499, 511, it was decided that a statute of Kansas making it unnecessary in any prosecution for a violation of a prohibition law to state in the accusation the name of the person to whom the alcoholic beverage was sold did not violate the bill of rights of the Constitution of that state.

These cases proceed upon the theory that where a criminal offense is committed against a person or his property it is essential to the identification of the crime that the name of such person shall be given, or such property described in the formal accusation: *State* v. *Munger,* 15 Vt. 290, 293. Where, however, the offense is not directed against any particular individual, but against the community, such as the alleged illegal sale of intoxicating liquor, the legislature may prescribe the form of indictment and dispense with the requirement to name in the accusation the person to whom the alcoholic beverage is sold: *Lea* v. *State,* 64 Miss. 201, 203 (1 South. 51).

1. As the general prohibition statute now in force in Oregon makes it unlawful to sell intoxicating liquor for beverage purposes it is believed the indictment in the case at bar is sufficient without naming the purchaser, and that the statute authorizing such omission does not violate the clause of the Constitution invoked.

The material parts of the bill of exceptions state, in effect, that evidence was introduced by the state tending to show that on the night of September 23, 1916, the defendant was and for some time prior thereto had been proprietor at Milwaukie, Oregon, of a place of amusement known as the "Friars' Club," where he kept for sale soft drinks, soda water, lemonade, etc., and provided music and served meals when they were ordered; that at the time mentioned about twenty men and women were present, some of whom were seated at tables and being served with food and soft drinks, while others were engaged in dancing; that K. Wilson and F. J. Reichard each testified that while eating at different tables at such club on that night he ordered with his food whisky, which was served by a waiter and paid for by each witness in the amount of 25 cents; and that it did not appear from the evidence that the defendant personally sold or delivered any intoxicating liquor on the night referred to, but the testimony disclosed he was about the house and in the room where the people were dining on that occasion and was then recognized by them as the proprietor and manager of the "Friars' Club."

The bill of exceptions contains a clause which reads:

"Plaintiff announced that it elected to stand on the alleged sale of intoxicating liquor to said K. Wilson."

Based upon such testimony the court charged the jury as follows:

"A sale may be made by a man's agent just as well as by himself, and if you find that the sale was actually made by an employee of Mr. Wilbur, Mr. Wilbur will be just as guilty as the man himself."

Thereupon defendant's counsel inquired:

"Does your Honor mean to say, even though he had no knowledge of it, and it was not impliedly or otherwise with his consent?"

The court replied:

"I mean it to be true even if it is without his consent."

An exception having been taken to the language thus employed it is contended that an error was committed in so charging the jury.

2. The statute declares:

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals, and to be tried and punished as such": Section 2370, L. O. L.

Section 41 of Chapter 141, Gen. Laws Or. 1915, relating to intoxicating liquors, repealed only such prior enactments on that subject as were in conflict therewith. The chapter so referred to did not repeal by implication Section 4937, L. O. L., nor Chapter 221, Gen. Laws 1913, which provide that in all prosecutions for an alleged illegal sale of intoxicating liquor, it is not necessary to show the knowledge of the principal to convict him for the acts of his agent or servant. If a principal would avoid conviction for an alleged violation of the law in such manner, he must not keep or have about his premises and under his control alcoholic beverages which might be illegally sold by his agent or servant on his account or for his benefit.

Under the provisions of the statute last referred to no error was committed in giving the instruction the sufficiency of which was challenged.

3. It would appear from the bill of exceptions that intoxicating liquor was illegally sold to K. Wilson and F. J. Reichard. It will be remembered that the state, evidently at the direction of the court, elected to try this action as for an alleged unlawful sale to Wilson, which choice was properly induced (*State* v. *Schweiter,* 27 Kan. 499, 511), and having thus been made a matter of public record the conviction can be pleaded in bar to any further prosecution for a sale on such occasion to that person.

It follows from these considerations that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Rehearing denied September 25, 1917.

PETITION FOR REHEARING.

(167 Pac. 569.)

From Clackamas: JAMES U. CAMPBELL, Judge.

On petition for rehearing. Rehearing denied.

Messrs. Fulton & Bowerman, Mr. John J. Fitzgerald and *Mr. Edward J. Brazell,* for the petition.

Mr. George M. Brown, Attorney General, and *Mr. Gilbert L. Hedges, contra.*

Department 2. Opinion by MR. CHIEF JUSTICE MCBRIDE.

4, 5. In their petition for rehearing counsel for defendant urge that Section 33 of Chapter 141, Gen. Laws of 1915, commonly known as the Prohibition Act, which section provides that the indictment need not state the name of the person by whom the liquor was sold nor that of the person to whom it was sold, violates not only Article I, Section 11, of the Constitution of this state but also the 6th and 14th Amendments to the Constitution of the United States. In the opinion already handed down in this case we have held that this contention so far as it relates to Article I, Section 11, of our Constitution is unsound, and the same line of reasoning pursued and the same authorities cited by Mr. Justice MOORE on that subject lead us to the conclusion that neither the 6th nor the 14th Amendment to the Constitution is violated by any provision of the section assailed. The petition for rehearing is denied. REHEARING DENIED.

MR. JUSTICE MOORE, MR. JUSTICE BEAN and MR. JUSTICE MCCAMANT concur.

Argued July 3, reversed July 17, rehearing denied September 25, 1917.

PORTLAND RY., L. & P. CO. *v.* OREGON CITY.

(166 Pac. 932.)

Dedication—Evidence—Weight and Sufficiency.

1. Evidence *held* not to establish dedication of a street by user.

Dedication—Acquiescence in Public Use.

2. The permission by the owner of spasmodic or occasional use by the traveling public of uninclosed land is not sufficient to indicate an intent to dedicate the property to public use.

Dedication—Acts Constituting.

3. That a city has passed ordinances referring to land that would be part of street, if extended, as part of that street, and that conveyances of property adjoining such land have been executed, designating it as part of street, cannot deprive owner of premises of his property without his consent.

Dedication—Acts Constituting—Intent.

4. To establish a dedication, owner's acts and declarations should be deliberate, unequivocal and decisive, and manifest a positive and unmistakable intention to permanently abandon his property to the specific public use.

[As to what amounts to a dedication of a highway, see note in 57 **Am. St. Rep.** 749.]

Dedication—Acts Constituting—Intent.

5. To a common-law dedication it is necessary that there be an appropriation of land by the owner to the public, either by express manifestation of purpose to devote land to public use or by acts or course of conduct from which law would imply such an intent.

Dedication—Acquiescence in Public Use—Intent.

6. If the open and known acts of the donor are such as to induce the belief that he intended to dedicate the way to public use, and the public and individuals act upon such conduct and acquire rights, which would be lost if the owner were allowed to reclaim the land, the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent.

Dedication—Estoppel to Deny.

7. Where settler on land, whose heirs subsequently become owners, files a map designating premises as part of a street, he and his successors in interest are estopped to deny that premises were dedicated as a street.

Dedication—Acts Constituting—Plats.

8. Filing of plat, showing that premises in question are reserved as private property, shows that there was no express dedication of lands to public use by virtue of map.

Dedication—Capacity to Dedicate.

9. An oral dedication of premises as a street cannot be shown by minutes of a city council reciting declarations of one who was not the owner at the time.

From Clackamas: JAMES U. CAMPBELL, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This is a suit to quiet title to a triangular shaped piece of land in "Mill Reserve" near the south end of Main Street in Oregon City. The complaint is in the usual form containing the allegations of ownership of a fee-simple title in the Portland Railway, Light and Power Company, and continuous possession for more than ten years under deeds of conveyance containing full covenants of warranty and seizin by plaintiff, and that defendant claims some interest therein.

The answer is a general denial, except that it admits that defendant claims an interest in the premises, and for a further answer alleges that the tract is a public street and has been such for a period of more than fifty years.

The reply is a general denial of the new matter in the answer and further alleges that defendant abandoned the premises as a highway in 1890. For a second separate reply the plaintiff avers that defendant is estopped to claim the premises because of long possession and improvements made by plaintiff. The trial court found that Main Street included the premises in question and rendered a decree accordingly, from which the plaintiff appeals.

About the year 1842 Dr. John McLoughlin settled on what is known as the "Oregon City Claim." He began selling lots about 1843. In 1850, by an act of Congress the United States government granted the claim to the State of Oregon for the benefit of the state university, excepting all lots sold by Dr. McLoughlin

prior to March 4, 1849. The plat of Oregon City was filed in 1851 by him. He died in 1857 leaving as his heirs and devisees Eloisa Harvey, Daniel Harvey, and David McLoughlin. The Harveys having purchased the interest of David McLoughlin became the sole owners of Dr. McLoughlin's interest in the Oregon City Claim. In 1862 the legislature of the State of Oregon granted to Eloisa Harvey and Daniel Harvey the title to the Oregon City Claim upon the payment of the sum of $1,000 for the benefit of the state university fund. No other plat of Oregon City has been made, but lots and blocks therein have ever since been sold with reference to the McLoughlin map, thereby adopting the plat filed. On this map that part of the Oregon City Claim south of blocks 1 and 29 and west of blocks 73, 74, 75, 76, and 77, on the east side of the river is designated as "Mill Reserve," and in the certificate of dedication attached to the map appears the following:

"All the space in front of the blocks on Water Street not covered by the width of the street (60) feet is reserved as private property. All the space below the edge of the bluff and along and in front of blocks 73, 74, 75, 76, and 77, is reserved as private property."

The premises, title to which is involved in this suit, are situated within Mill Reserve and are below the bluff and in front of blocks 73, 74, 75, 76, and 77. For a great number of years there has been a road leading in a southerly direction from the end of Main Street through Mill Reserve to Canemah, the exact location of which is in dispute and is not shown on any official map. When plaintiff's predecessors in interest bought the Mill Reserve from the Harveys in 1865 their deed contained the following exception: "Also saving and reserving the public highway and railroad upon said premises." In 1861 a flood occurred in the

Willamette River which destroyed the Island Mill, the Rossi Foundry and the McLoughlin Mill, and they have never been rebuilt. The flood also destroyed the roads leading to these mills and the foundry and changed the surface of the property immediately east of and around Imperial Mill, which was situated west of the southerly portion of the tract in dispute, by washing away the earth and leaving a ledge of rock exposed. In 1866 the plaintiff's predecessors in interest built the basin dam or wall on the side where the present basin wall stands immediately southerly of the land in dispute. This dam or wall holds back the waters of the Willamette River in such a manner that all that property designated as "basin" on the maps in evidence herein is covered with several feet of water. In 1890 another flood occurred which overflowed the basin wall and destroyed that part of the road to Canemah. Immediately thereafter the city built a plank road thirty-two feet in width east of the Imperial Mill and adjacent to the property in controversy where the road has remained to the present time.

Plaintiff claims record title to the tract as follows: In 1865 Daniel Harvey and wife conveyed by warranty deed to the People's Transportation Company all the Mill Reserve described as above

"save and except so much of said premises as has been conveyed by deed by said parties of the first part, and are now understood to be owned by the Oregon City Woolen Mfg. Co., Savier & Co., and Moore, Marshall & Co., and also saving and reserving the public highway and the railroad upon said premises, and also all ferry rights, appurtenant to said premises, and also a right of way for wagons, etc., from said premises to a ferry and from a ferry to the top of said bluff. Together with all the water rights and privileges appurtenant."

Thereafter the same passed by a succession of warranty deeds from the People's Transportation Company to the plaintiff herein. During the last seven years before this suit, the Hawley Pulp & Paper Company, as tenants of the Portland Railway, Light & Power Company, have built heavy works in the form of bents and platforms for the purpose of piling and stowing pulp on the south portion of the tract, and have built a siding off the main line of the above company's railroad, expending some $2,000 in improvements on the triangle. The city authorities objected and notified the tenant to vacate and this suit resulted. Prior to the time of such occupancy by the Hawley Pulp & Paper Company, the lessee of plaintiff, there was a large hole in the ground down to bedrock which was crossed by a couple of flumes. The Imperial Mill, as now constructed, extends 18 inches over the west line of Main Street projected, and the Hawley Pulp & Paper Company has built an elevated structure over the highway which is used in trucking pulp from Imperial Mill to Sulphite Mill on the east side of the highway. There is shown on the plat in evidence what is termed a private roadway forty feet in width, commencing about one third of the way from the northerly point of the triangle and extending from the road to Canemah across the tract in dispute to the mill on the west. That part of the tract south of this private roadway is separated by a railing on three sides from the Canemah road, the private roadway, and the walk in front of the mill on the west. There is also a railing on the north of the private roadway extending between the Canemah road and the open space north of the private road to a point opposite the roadway leading to the O. R. & N. Company's dock. The so-called private roadway was granted by deed

to the owner of the mill property on the west of the tract in dispute and is covered with planking upon a grade about one foot below the planking of the Canemah road. The condition of this so-called private roadway and that leading to the O. R. & N. dock are not involved in this suit and only come in incidentally in mentioning travel over the same in connection with the public highway. The private roadway is maintained by the Mill Company for the purpose, as it claims, of ingress to and egress from the mill.

REVERSED. DECREE RENDERED.

For appellant there was a brief over the names of *Mr. Leslie Craven* and *Messrs. Griffith, Leiter & Allen,* with an oral argument by *Mr. R. A. Leiter.*

For respondent there was a brief and an oral argument by *Mr. C. Scheubel.*

MR. JUSTICE BEAN delivered the opinion of the court.

The land involved is in the shape of a right angled triangle, the base being on the west 182 feet with a perpendicular on the south approximately eighty feet. The matter for determination is whether or not the tract has been dedicated to the public as a street or highway. The city contends: First, that the plaintiff never acquired title to the property in question by deed or otherwise; second, that the tract was dedicated as Main Street by Dr. McLoughlin and recognized as such by his successors in interest, including the plaintiff; third, that the tract has been recognized by the public as a part of Main Street since 1855 and prior thereto and was traveled by the public generally from that time until the flood of 1890 when the high

water washed away the earth and left a deep hole on a part of the tract; that the city council continually from 1865 to the present time exercised jurisdiction over the tract as part of Main Street, it being the position of the city that Main Street extended in a straight line from the platted portion to the basin and that formerly a street at right angles and adjoining the basin wall connected the same with the Canemah road.

1–3. When Dr. McLoughlin platted the then future city he displayed a prophetic vision of the beehive of manufacturing industries in and adjoining Mill Reserve which, while they were small in the beginning, have for years been advanced to stages of great magnitude. The right of way for the streets and ways approaching and passing these various plants do not appear to have been neglected. Neither does it seem that there has been any encroachment upon the area so wisely reserved in order to afford some space for the pulsation of industrial life. Although the Willamette River on the west and the bluff on the east fix natural limitations of breadth of the low land at this point, there is no real conflict between the owners of industrial plants and the public as to the means or ways for transportation and travel. None of the grantees of any of the territory embraced in Mill Reserve are objecting to the establishment or use of the highway over the same, which is sometimes designated as a street and sometimes as a county road extending towards Canemah. The only question is: Where is such public way located and what are the limits which its necessities require? Many of the old and respected residents delineated the history of the matters relating thereto. Some perhaps differ from others slightly in memory and use somewhat variant language to describe the interesting and important events which

have had an influence in shaping the issue herein. No one, however, questions the truth of the utterances of any of the witnesses. A narration of the evidence would consume too much time and occupy more than the allotted space. Whatever the conditions of the highway leading southerly from the end of Main Street as platted by Dr. McLoughlin were prior to 1890 when the high water changed the same it is clear from the evidence that beginning at the northerly end of the triangle about 85 feet south of the southerly end of Main Street, as platted, the well defined traveled highway has since that date extended southerly adjoining the land in question on the easterly side leading to Canemah. This roadway constructed by the city is separated on the west from the tract in question by a railing, except for a forty-foot plank roadway leading therefrom to the Hawley Pulp & Paper Company's mill, on the west line of Main Street if extended. The road to the mill was constructed and is maintained by the Mill Company. Formerly the road leading southerly extended about 150 feet over what is now the basin, a part of the same being along an old breakwater and a part over a trestle. Thence one branch led southwesterly to the Island Mill and the other bore easterly towards the bluff and extended to Canemah. Prior to 1890 the triangle was somewhat level but rough. An ox team could be driven in east of the mill, the most of the trucking to and from the mill being at the north end thereof. It is in evidence that some freight was unloaded from boats over the basin wall and transported from there to different places, but mostly, we think, on a plank walk at the east of the mill. The flood of 1890 washed the earth away from the tract leaving bare rough bedrock and necessitating planking the way to the mill and the road to Cane-

mah for a short distance. Since that time the travel has been well confined to the ways named. The most that can be said is that prior to that time the travel spread out over some of the disputed area. The evidence does not evince a dedication by user of any part of the triangle. The permission by the owner of spasmodic or occasional use by the traveling public of uninclosed private real property is not sufficient to indicate an intent to dedicate the property to public use. The city has passed ordinances referring to the land as a part of Main Street and conveyances of property adjoining what would be Main Street if extended have been executed designating an extension of the line of Main Street as the line of the street. Others have referred to the line as a projection of the line of Main Street. Such declarations by the officials of the city would not deprive the owner of his property without his consent.

The intention of the owner as evidenced by his acts and the acts which he permits and encourages is controlling on the issue of dedication. In order to constitute a dedication by parol there must be some act proved which would clearly indicate an intention of the owner to dedicate the land to public use: *Lownsdale* v. *City of Portland,* 1 Or. 381, 405 (Fed. Cas. No. 8578); *Lewis* v. *City of Portland,* 25 Or. 133, 155 (35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736); *Parrott* v. *Stewart,* 65 Or. 254, 259 (132 Pac. 523); *McCoy* v. *Thompson,* 84 Or. 141 (164 Pac. 589).

4. The owner's acts and declarations should be deliberate, unequivocal and decisive and manifest a positive and unmistakable intention to permanently abandon his property to the specific public use. If they are equivocal and do not clearly and plainly indicate such intention they are insufficient to establish a dedi-

cation: *Hogue* v. *City of Albina,* 20 Or. 186, 187 (25 Pac. 386, 10 L. R. A. 673).

5. The dedication of land to the public for use as a street or highway may be made either by statutory dedication or by common-law dedication. In the case at bar Dr. McLoughlin, by the map and plan filed, did not undertake to dedicate the land in question to a public use. There has been no attempt to make a statutory dedication. The common-law dedication may be either express or implied. In both common-law dedications it is necessary that there be an appropriation of land by the owner to the public; in the one case by some express manifestation of his purpose to devote the land to the public use; and in the other by some act or course of conduct from which the law would imply such an intent: Elliott on Roads and Streets (3 ed.), § 133. It is stated in that work:

"An implied dedication is one arising by operation of law from the acts of the owner. It may exist by an express grant and need not be evidenced by any writing, nor indeed by any form of words oral or written. It is not founded on a grant nor does it necessarily presuppose one, but is founded upon the doctrine of equitable estoppel. It is in the nature of an estoppel *in pais,* and is irrevocable. It may be established by evidence of conduct and in many ways. If the donor's acts are such as to indicate an intention to appropriate the land to the public use, then upon acceptance by the public the dedication becomes complete": Elliott on Roads and Streets (3 ed.), § 137.

6. It is essential that the donor should intend to set the land apart for the benefit of the public. Such intent is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. If the open and known acts of the donor are of such a character as to induce the belief that he intended to

dedicate the way to public use, and the public and individuals act upon such conduct and proceed as if in fact there had been a dedication and acquire rights which would be lost if the owner were allowed to reclaim the land, then the law would not permit him to assert that there was no intent to dedicate no matter what may have been his secret intent: Elliott on Roads and Streets (3 ed.), § 138.

In a recent case of *Barton* v. *Portland,* 74 Or. 75 (144 Pac. 1146), this court, speaking through Mr. Justice MOORE, discussing prior decisions of this court, said at page 77 of the opinion:

"The rule has been followed in this state that the ordinary statute of limitations has no application as respects the public rights of a municipal corporation, but that by the laches of its officers in failing properly to guard such rights the principle of equitable estoppel may be invoked by a private party, not dependent upon the mere lapse of time, but upon all the circumstances of the case," citing *Schooling* v. *Harrisburg,* 42 Or. 494 (71 Pac. 605); *Oliver* v. *Synhorst,* 48 Or. 292 (86 Pac. 376, 7 L. R. A. (N. S.) 243), and other cases.

In the case of *People* v. *Cleveland etc. Ry. Co.,* 269 Ill. 555 (109 N. E. 1064), the Supreme Court of Illinois said at page 1065:

"Where the public has ceased to travel a road and acquired another which accommodates the public travel, an abandonment of the first road may be presumed. The public authorities having charge of the highways are invested with the right to decide between the relative advantages of the two roads. Where a highway ceases to be used, and another is acquired in its place with the consent and approval of the public authorities, and the use of the original highway has ceased for a sufficient length of time to clearly indicate an acceptance by the public of the new highway,

the old one will be regarded as abandoned'': See, also, *Lucas* v. *Payne*, 141 Iowa, 592 (120 N. W. 59).

7–9. While the city has attempted to exercise jurisdiction over the land in controversy, it does not appear that it has ever expended a penny in improving the same or removing any obstructions therefrom. If the premises in suit had been designated on the map filed by Dr. McLoughlin as a part of the street he and the Harveys and their successors in interest would be estopped to deny that it was dedicated for the public use as a street by virtue of the rule of law announced in *Mutual Irr. Co.* v. *Baker City*, 58 Or. 306 (110 Pac. 392, 113 Pac. 9). The land was designated on that map as Mill Reserve and it was stated that all the space below the edge of the bluff along and in front of the blocks mentioned was reserved as private property. It is clear therefore that there was no express dedication of the land to the public use by virtue of the map. On the contrary, an intention to reserve this land as private property is plainly expressed. It appears that an entry of the minutes of the city council was introduced in evidence which recites that Dr. McLoughlin informed the council that Main Street ran into the Willamette River. It is urged by counsel for the city that this tends to prove an oral dedication of the premises as a street. At the time of this statement made by Dr. McLoughlin, he did not own the premises in controversy, but died before the title was acquired.

The record does not disclose that there has been either a statutory or common-law dedication of the land to the public as a street or road. The city never acquired an easement for a highway over the tract either by virtue of a dedication or by user.

The decree of the trial court will therefore be reversed and one entered here quieting the title to the real property as prayed for.
REVERSED. DECREE RENDERED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE took no part in the consideration of this case.

Argued April 20, affirmed September 25, 1917.

LAWRENCE v. CITY OF PORTLAND.

(167 Pac. 587.)

Municipal Corporations—Public Improvements—Delegation of Powers.

1. The power of the council of a city to "determine the character, kind and extent of improvements" to be made cannot be delegated to the city engineer.

Municipal Corporations—Public Improvements—Delegation of Powers.

2. Where a city council ordered the city engineer to submit plans for two kinds of paving, and he complied, and thereafter the council called for bids, accepted the lowest bid and by ordinance determined the character, kind and extent of the improvements, the council did not delegate its functions to the city engineer.

[As to delegation by municipal corporation of powers involving exercise of discretion, see note in 29 **Am. Rep.** 108.]

Municipal Corporations—Public Improvements—Notice—Requisites.

3. Under Portland City Charter, Section 376, the notice of the resolution of an improvement need not be printed in letters not less than one inch in length, but only the title, "Notice of Street Work," need be of such size.

Municipal Corporations—Public Improvements—Double Improvement.

4. The paving of a street, whose continuity was interrupted by a small park, does not constitute two improvements, so as to require their separation, in view of Portland City Charter, Section 374, as to public improvements.

Municipal Corporations—Public Improvements—Exaction of Guaranty—Powers of Council.

5. The requirement in a contract for paving a street that the contractor shall make good any defects in materials or workmanship occurring within five years does not so increase the burden or the cost of the improvement as to vitiate the assessments therefor.

Municipal Corporations—Public Improvements—Performance of Contract—Powers of Council.

6. The determination made by the council that the specifications and the contract of a paving contractor have been fulfilled and completed is conclusive.

From Multnomah: HARRY H. BELT, Judge.

This suit was commenced by P. S. Lawrence and twenty-two other citizens and property holders against the City of Portland, a municipal corporation, H. R. Albee, Mayor, C. A. Bigelow, Will H. Daly, Wm. L. Brewster, Robert G. Dieck, commissioners, A. L. Barbur, auditor, and Wm. Adams, city treasurer, to restrain the collection of assessments for street improvements. The suit was dismissed and plaintiffs appealed. Affirmed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought by certain property owners to enjoin the collection of assessments levied on their property to pay for the improvement of East Harrison Street in the City of Portland. Plaintiffs contend that the proceedings are fatally defective in the matter of compliance with the procedure prescribed by the charter and also that the work was done in a careless, inefficient manner, out of harmony with the requirements of the contract. The lower court found for the defendants and dismissed the complaint. Plaintiffs appeal. AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Albert H. Tanner.*

For respondents there was a brief over the names of *Mr. Walter P. La Roche,* City Attorney, and *Mr. Lyman E. Latourette,* Deputy City Attorney, with an oral argument by *Mr. Latourette.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1, 2. The proceedings were initiated by a resolution of the city council adopted January 28, 1914. This resolution demanded:

"* * from the city engineer plans, specifications and estimates for two or more kinds of appropriate improvements, at least one of which must be of a nonpatentable kind, and the probable total cost of each class of improvement and the amount of work required to be done, and that he file such plans, specifications and estimates in the office of the auditor of the City of Portland."

It will be noted that this resolution does not determine the kind of improvement to be laid. The charter of the City of Portland clothes the council with power "to determine the character, kind and extent" of the improvement and, as contended by plaintiffs, this power cannot be delegated to the city engineer: *Miller* v. *Portland,* 78 Or. 165, 169 (151 Pac. 728); *King Hill Brick Mfg. Co.* v. *Hamilton,* 51 Mo. App. 120, 124; *St. Louis* v. *Clemens,* 43 Mo. 395, 403, 404; *Bolton* v. *Gilleran,* 105 Cal. 244, 247 (38 Pac. 881, 45 Am. St. Rep. 33). The resolution, however, was preliminary to further action by the council. The plans requested were furnished by the city engineer February 18, 1914, specifying two materials for use in paving the street in question, one of which was nonpatentable. Thereafter the council by resolution called for bids on these two materials in accordance with the plans of the city engineer, which set out accurately the work to be done and gave all information required by the charter. On the coming in of the bids the council on May 13, 1914, accepted the lowest bid for laying an asphalt street and by ordinance determined the "character, kind and

extent" of the improvement. We think that the procedure adopted conforms to the charter and that it did not delegate to the city engineer the functions of the council: *Miller* v. *Portland,* 62 Or. 26, 31 (123 Pac. 64).

3. Section 376 of the charter, after directing the publication of the resolution of the council declaring its purpose to improve, provides that:

"The City Engineer within five days from the first publication of said resolution shall cause to be conspicuously posted at each end of the line of the contemplated improvement a notice headed 'Notice of Street Work' in letters of not less than one inch in length, and said notice shall contain in legible characters a copy of the resolution of the Council and the date of its adoption, and the Engineer shall file with the Auditor an affidavit of the posting of said notices, stating therein the date when, and places where the same have been posted."

It is stipulated that the letters in the heading of the notice posted were one inch in length, but that the letters in the remainder of the notice were less than one inch long. Plaintiffs claim that the charter requires the entire notice to be printed in letters at least an inch in length. We do not so read the statute. The requirement is that the letters in the heading shall have the stated size: *Bank of Columbia* v. *Portland,* 41 Or. 1, 7 (67 Pac. 1112). The size of type to be used in the body of the notice is committed to the discretion of the city engineer, subject to the requirement that the type shall be legible.

4. In reliance on the case of *Oregon Transfer Co.* v. *Portland,* 47 Or. 1 (81 Pac. 575, 82 Pac. 16), it is contended that these assessments are void because the improvement covers two portions of the street. The improvement provided for begins at the east line of East Twelfth Street and extends easterly to a line

twenty feet east of the east line of an alley running through Blocks 7 and 10 in Ladd's Addition. At this point East Harrison Street intersects with another street and beyond the intersection there is a small park; east of the park there is another intersecting street and beyond that street the second portion of the improvement begins, extending easterly for two blocks. It is expressly held in *Oregon Transfer Co.* v. *Portland,* 47 Or. 1, 5 (81 Pac. 575, 82 Pac. 16), that "the intersection may with propriety be included in or omitted from a contemplated street improvement without destroying its continuity." This principle being established and the little park not being capable of improvement as a street, we think that under the facts this improvement should be regarded as a continuous one.

Moreover, the charter has been amended since the decision in *Oregon Transfer Co.* v. *Portland, supra.* When that decision was rendered, Section 375 of the charter contained the following requirement:

"The improvement of each street or part thereof shall be made under a separate proceeding."

This language, on which the decision in the case cited chiefly turned, was eliminated by amendment of the charter prior to the proceedings with which we are concerned in this cause. Section 374 of the charter, in force when this improvement was made, provides that:

"The Council, whenever it may deem it expedient, is hereby authorized and empowered to order the whole or any part of the streets of the City to be improved, to determine * * the extent of such improvement. * *

"The Council, in improving any street or streets or any part or parts thereof, within a district that includes paving, shall require from the City Engineer plans, etc. * * The action of the Council in declaring its intention to improve any street or streets or any part or

parts thereof * * may all be done at one and the same meeting of the Council."

Similar language is found in Section 375 of the charter. If this proceeding be treated as one for the improvement of separated portions of the street in question, it was still within the authority of the council to provide for it.

5. The contract under which this work was done contains the following provision:

"The contractor hereby agrees to perform all of the work provided by this contract in such good, skillful and substantial manner that no repairs shall be required to said improvement for a period of 5 years after its completion and acceptance by said City, and if, during said period, any defects shall appear in said improvement which are attributable in any manner to defective materials or workmanship, the contractor hereby undertakes and guarantees to repair such defects at his own expense, and when so ordered by the council of said city."

It is contended by plaintiffs that this stipulation laid a burden on the contractor which properly belonged to the city, that it required the contractor to exact a price for the work in excess of its reasonable value and that the improper burden thus laid on the property owners vitiated the assessments. In support of these contentions we are cited to *Portland* v. *Bituminous Paving Co.,* 33 Or. 307, 313–316 (52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527); *Alameda Macadamizing Co.* v. *Pringle,* 130 Cal. 226, 227 (62 Pac. 394, 80 Am. St. Rep. 124, 52 L. R. A. 264); *Anderson* v. *Fuller,* 51 Fla. 380, 390 (41 South. 684, 120 Am. St. Rep. 170, 6 L. R. A. (N. S.) 1026); *Inge* v. *Board of Public Works,* 135 Ala. 187, 201 (33 South. 678, 93 Am. St. Rep. 20). These cases hold that it is beyond the power of municipalities in drawing contracts for muni-

cipal work to be paid for by special assessments, to exact from the contractor performance of stipulations not properly incident to the careful performance of the work and that where such exactions are laid and the expense of the work is thereby substantially increased, the contract is void and the property owners are entitled to relief. It is held, however, that the municipalities are warranted in insisting upon skillful work and that they may incorporate in the contract such guaranties as will practically insure that the contractor fulfills his obligations. This distinction is clearly pointed out in the decisions of this court on the subject. The opinion in *Portland* v. *Bituminous Paving Co.*, 33 Or. 307 (52 Pac. 28, 72 Am. St. Rep. 713, 44 L. R. A. 527), was written by Mr. Justice WOLVERTON with careful discrimination; on page 313 of the report he points out the distinction above referred to and on page 316 he cites with approval the case of *Schenectady* v. *Trustees of Union College*, 66 Hun (N. Y.), 179 (21 N. Y. Supp. 147), where a stipulation akin to that above quoted was upheld as laying no burden on the contractor other than a guaranty of workmanlike performance of his obligations. The question came before this court again in the case of *Allen* v. *Portland*, 35 Or. 420, 450 (58 Pac. 509), and Mr. Justice WOLVERTON again wrote the opinion. A stipulation substantially identical with that exacted in this case was held to be proper. The conclusions reached in the latter decision are supported by *New Haven* v. *Eastern Paving Brick Co.*, 78 Conn. 689, 700 (63 Atl. 517); *Schenectady* v. *Trustees of Union College*, 66 Hun, 179, 187, 188 (21 N. Y. Supp. 147); *Wilson* v. *Trenton*, 60 N. J. Law, 394, 396, 397, (38 Atl. 635); *Hedge* v. *Des Moines*, 141 Iowa, 4, 15, 16 (119 N. W. 276); *State* v. *District Court*, 80 Minn. 293,

308, 309 (83 N. W. 183); *Robertson* v. *Omaha,* 55 Neb. 718, 723, 724 (76 N. W. 442, 44 L. R. A. 534); *Kansas City* v. *Hanson,* 60 Kan. 833, 835, 836 (58 Pac. 474). We think that the provision in this contract, complained of by plaintiffs, falls within the rule defined by these latter authorities, that it affords only a proper guaranty of the performance of the obligations of the contract and that it does not nullify the assessments.

It is finally contended that the work was unskillfully done, that the provisions of the contract were disregarded by the contractor in seven respects pointed out in the complaint and that, as a result, the street is less durable than if it had been constructed as required by the contract. It is alleged that plaintiffs repeatedly protested as the work proceeded and that notwithstanding these protests the street was accepted by the council. If the question were a new one this branch of plaintiffs' contention would appeal persuasively to the writer. It has long seemed to the writer unfair for a court of equity to refuse relief to property owners on the ground that the work was improperly done and yet to relieve them from their assessments if the notice fails to point out definitely the kind of improvement to be made: *Hawthorne* v. *East Portland,* 13 Or. 271 (10 Pac. 342); or if the posted notice is headed by letters smaller than those required by the charter: *Bank of Columbia* v. *Portland,* 41 Or. 1, 7 (67 Pac. 1112); or if proof of the publication of the notice fails to conform to the statutory requirements: *Jeffery* v. *Smith,* 63 Or. 514 (128 Pac. 822). I do not criticise these decisions; under the statutes on which they were based, the conclusions reached were inevitable; there is nevertheless, in my opinion, an incongruity in relieving the property owner where the defects are in proce-

dure and in denying relief on the substantial ground that the contract has not been complied with.

6. The question is no longer an open one in this jurisdiction. In *Hughes* v. *Portland,* 53 Or. 370, 385 (100 Pac. 942), Mr. JUSTICE BEAN says:

"Findings of the council that the work has been done substantially in accordance with the contract * * are conclusive in the absence of fraud, unless made under an erroneous principle of law."

This same rule has been announced in *Duniway* v. *Portland,* 47 Or. 103, 112 (81 Pac. 945); *Rubin* v. *Salem,* 58 Or. 91, 97 (112 Pac. 713); *Hendry* v. *Salem,* 64 Or. 152 (129 Pac. 531). Two of these cases have recently been cited with approval in a well-considered decision by Mr. Justice BURNETT,—*Cormack* v. *Cormack,* 82 Or. 108 (160 Pac. 380). The rule so frequently and clearly announced has become a part of the common law of the state and it is in harmony with the weight of authority in other jurisdictions. It is fair to presume that if it were unsatisfactory to the people it would have been abrogated by amendment of our city charters, especially as the people have been vested with the power of such amendment under the initiative for eleven years last past. It appears by the record that the remonstrance of these plaintiffs was laid before the city council, that one of the plaintiffs was heard in person and that the council found that the improvement had been completed substantially in accordance with the plans and specifications. The street was thereupon accepted. There is no evidence of fraud or that the council acted under an erroneous principle of law. The action of the council is therefore conclusive of this branch of the case.

The decree is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued September 19, reversed and remanded September 25, 1917.

McPHEETERS *v.* SMITH.

(167 Pac. 575.)

Trial—Findings of Fact—Necessity.

1. In an action for the price of a piano conditionally sold, where the sole defense was that the quality of the instrument was misrepresented by plaintiff, a judgment for the return of the piano could not be sustained, in the absence of a finding of fact as to whether the quality of the instrument was misrepresented.

Trial—Findings of Fact—Necessity—Requests.

2. Where the findings are sufficient to justify a judgment for one party, and the other party fails to object to them, or to request findings conformable to his theory, the findings made will stand; but such is not the rule where the findings made are insufficient to justify a judgment for either party.

From Multnomah: Henry E. McGinn, Judge.

Action by Joseph McPheeters against Dr. N. L. Smith, in which findings were made and a judgment rendered thereon in favor of defendant, and plaintiff appeals. Reversed and remanded.

Department 1. Statement by Mr. Chief Justice McBride.

This is an action to recover upon a conditional sale, note, and contract for the purchase of a piano. In his answer defendant alleges fraud and misrepresentation as to the character and quality of the instrument. The matter in the answer having been put in issue by appropriate denials the following findings were rendered:

"The contract was made as is alleged and agreed upon; the price of the piano was grossly in excess of its market value; the defendant has paid more than the value of the piano in installments; the defendant has agreed and offered to return the piano, forfeiting all payments made; the plaintiff refuses to accept the piano because invention has greatly improved the

piano and has made the old piano one of the middle ages; the plaintiff will not take back the piano because he wants judgment for the unpaid balance."

The court decreed:

"The court having heretofore prepared and filed its findings of fact and conclusions of law herein, and it appearing therefrom that the plaintiff is entitled to a judgment for the return of the piano described in the defendant's answer and referred to in said findings of fact, and that neither party shall recover costs and disbursements, it is, therefore, ordered and adjudged that the defendant be and he is hereby required to deliver and the plaintiff is hereby required to accept the return of the piano described in the answer of the defendant herein, to wit, a Ferrand Cecelia piano, and that neither party recover costs in said action."

There was no request by either party for further or additional findings, and there is no bill of exceptions.

Reversed and Remanded.

For appellant there was a brief and an oral argument by *Mr. Boon Cason.*

For respondent there was a brief over the name of *Messrs. Bernstein & Cohen,* with an oral argument by *Mr. Alex Bernstein.*

Opinion by Mr. Chief Justice McBride.

1. Defendant in his answer while first formally denying the contract practically admits that he made it, suggesting only certain immaterial variations, and asks to be relieved from it because the quality of the instrument was misrepresented to him by the seller. This was substantially the sole issue made by the pleadings. It was an affirmative defense, and before defendant could have a judgment releasing him from what was otherwise his confessed legal obligation to

pay for the instrument there should have been a finding of facts showing that the defense was true. This is the holding in *Freeman* v. *Trummer,* 50 Or. 287 (91 Pac. 1077). Here there is no finding upon the only issue upon which defendant depended to exonerate him from payment, in fact no finding upon any material issue in the case, and, therefore, nothing upon which to base a judgment.

2. Where the findings are sufficient to justify a judgment for one party, and the other party fails to object to them or to request findings conformable to his theory, the finding made will stand, but such is not the rule where the findings made are insufficient to justify a judgment for either party. It is to be regretted that the appealing party did not bring up the evidence by a bill of exceptions as we might then have been enabled to dispose of this small case without a new trial; but in the present condition of the record the judgment must be reversed and a new trial ordered. REVERSED AND REMANDED.

MR. JUSTICE BENSON, MR. JUSTICE BURNETT and MR. JUSTICE BEAN concur; MR. JUSTICE HARRIS not sitting.

Argued September 19, affirmed September 25, 1917.

WESTERN WAREHOUSE CO. *v.* NEW AMSTERDAM CASUALTY CO.

(167 Pac. 572.)

Insurance—Indemnity—Personal Injury—Liability.

1. Insurer *held* not liable on an accident indemnity policy for injury of plaintiff's employee in elevator accident; the accident occurring while the employee was engaged in boarding up the shaft, and not while he was in the car, or in the elevator-well or hoistway, or while entering or alighting from the car, for which accidents

alone the contract provided indemnity, and the elevator being in use, during the progress of such work, contrary to policy provisions.

Witnesses—Inconsistent Statements—Cross-examination.

2. In action on accident indemnity policy, the president's written report of accident and plaintiff's answer in suit by injured employee were admissible on cross-examination, in view of Section 860, L. O. L., providing that the adverse party may cross-examine as to any matter stated in or connected with the direct examination, and Section 864, providing that a witness may be impeached by evidence that he has made at other times statements inconsistent with present testimony, and if such statements be in writing they shall be shown to the witness, and Section 711, providing that when part of an act, declaration, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other party, and when a detached act, etc., is given in evidence, any other act necessary to make it understood may also be introduced, where plaintiff's witnesses testified as to the details of the accident, and had introduced in evidence the injured employee's complaint, which was a detached writing, for the proper explanation of which the admission of the answer was necessary.

Witnesses—Cross-examination—Effect.

3. Cross-examination of a witness is part of the case of the party for whom he testifies, and the court is authorized to consider papers admitted on cross-examination as part of plaintiff's case in chief, and to draw conclusions of fact therefrom.

Insurance—Indemnity—Personal Injury—Burden of Proof.

4. In action on an accident indemnity policy, it was incumbent on plaintiff to prove that the injury to his employee came within the policy terms; the defendant being entitled to rebut this by cross-examination.

[As to admissibility in evidence against pleader of pleading superseded by amended pleading, see note in **Ann. Cas.** 1913A, 1132.]

Department 1. Statement by MR. JUSTICE BURNETT.

The defendant issued an indemnity policy insuring the plaintiff against liability for accident happening in connection with the operation of the latter's elevator. The complaint alleges an injury to one of the plaintiff's employees for which it was compelled to respond to him in damages recovered by an action at law which the defendant here was called upon to defend, but refused. It is said, also, that the defendant denies liability under its policy and that the plaintiff has fully complied with all its conditions. The issuance of the policy and the happening of the accident to the em-

ployee are admitted; but the substance of the defense is that the accident for which indemnification is sought is not within the terms of the policy. At the close of the plaintiff's case in a jury trial a judgment of nonsuit was entered against it on motion of the defendant. The plaintiff appeals and relies upon that ruling as the principal error. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William P. Lord.*

For respondent there was a brief and an oral argument by *Mr. Frank J. Lonergan.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The facts disclosed by the testimony of the plaintiff are substantially these: In the warehouse which it occupied there was an elevator extending from the basement to the upper stories of the building. It was installed against the north wall which forms one side of the shaft. The entrance to the elevator was on the south side and when not in use gates there prevented persons from entering. Except where shut in by partition walls or a stairway, the east and west sides of the elevator shaft were barred only by two planks about eight inches wide nailed to the uprights forming the frame of the shaft, and constituting a barrier about three and one-half feet high. An inspector, however, required this shaft to be inclosed to a greater height where thus exposed. The president of the defendant directed two employees, named Rutt and Barringer, to take some waste lumber from the basement and board up the sides of the elevator shaft on the different stories of the building where it

was open, as described. They had completed the work in the basement and as far up as the second story. There remained yet to be finished the part in the third story. At this juncture Barringer was called to receive some freight for storage in the warehouse. He accordingly left Rutt to go on with the task. The latter engaged in carrying some boards up the stairway to the third story for the purpose of completing the job. While he was thus employed Barringer operated the elevator for the purpose of moving freight when, for some reason not disclosed, Rutt got his head and shoulders caught under the descending counterweights of the machine and was injured. It was for the damages plaintiff here was compelled to pay Rutt as the result of his action against it which the present defendant is called upon to pay under its indemnity policy.

1. The admitted policy provides that the defendant agrees to indemnify the plaintiff

"against loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered while this policy is in force, including death resulting at any time therefrom, by any person or persons while in the car of any of the elevators described in the schedule or in the elevator-well or hoistway thereof or while entering upon or alighting from such car, subject to the following conditions: Condition A. This policy does not cover * * loss from liability from injuries or death suffered by or caused by * * (2) any person during the making of additions to or structural alterations in or extraordinary repairs of any elevator plant, unless a written permit is granted by the company specifically describing the work; but no elevator shall be used for any service while additions, alterations or repairs of any kind are being made in or about such elevator; * * ."

The part of the policy quoted prior to Condition A affirmatively states to what persons the indemnity is to be applied. It is (1) to any person or persons while in the car of any of the elevators described; (2) to any person or persons in the elevator-well or hoistway thereof; or (3) to any persons while entering upon or alighting from such car. Rutt did not come within any of these classes. He was not in the car, nor in the elevator-well, nor entering upon or alighting from the car.

On the other hand the condition is a negative statement limiting the liability of the insurer. It is said in the policy that it does not cover loss from liability for injuries suffered by any person whatever while additions or repairs are being made to the elevator plant; further, that no elevator shall be operated while additions, alterations or repairs of any kind are being made in or about such elevator. Directions had been given to Rutt with his fellow-employee to board up the open spaces on the elevator shaft wherever open. This work was in progress and had not been completed at the time of the accident. Moreover, the elevator was being used for service in moving freight while these repairs about it were being made, all contrary to the condition mentioned. It is not pretended that any permit, either verbal or written, was granted by the company describing the work to be done. Considering both the positive and the negative terms of the policy, Rutt was not within their purview, and hence there could be no recovery on the case thus made for the plaintiff on the evidence.

2. The plaintiff's complaint of course was a statement of its cause of action designed to bring Rutt within the category of persons for the injury of whom the indemnity would be available, and the effort of

those who testified for it was towards that end. A witness for the plaintiff, who at the time of the injury was its president, was on cross-examination confronted with a report made and signed by him as such president and directed to the defendant stating the circumstances of the casualty, in which he answered the question, "How did accident happen?" in this language, referring to the injured employee:

"Was moving merchandise and nailing up boards on elevator shaft to prevent any merchandise falling down shaft. He looked over railing as cage was going up, and the balance weights descending caught his head and shoulder between weight and railing."

In support of its contention here the plaintiff put in evidence the complaint in the case which Rutt brought against it and in which he recovered damages, together with the summons, the verdict, and the cost bill therein. The defendant here offered the answer which the present plaintiff made in that litigation wherein it was stated, in substance, that at the time of the accident Rutt was making repairs about the elevator shaft. The answer was verified by a witness for the plaintiff here who at the time of the injury was its secretary. The report and the answer referred to, after having been presented to the witnesses who signed them, were introduced in evidence as part of their cross-examination on the ground that they tended to contradict their present statements. The plaintiff here predicates error on the admission of the two documents.

It is said in Section 860, L. O. L.:

"The adverse party may cross-examine the witness as to any matter stated in his direct examination, or connected therewith, and in so doing, may put leading questions. * * "

Section 864, L. O. L., provides:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done, the statements must be related to him. * * If the statements be in writing, they shall be shown to the witness before any question is put to him concerning them."

It is also stated by Section 711, L. O. L.:

"When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

The witnesses in question had testified at length upon the question of the happening of the accident. It was legitimate cross-examination to interrogate them as to their declarations in direct testimony, and as to matters properly connected therewith. Confronting them with the papers mentioned was permissible in that respect so as to bring out the whole truth of that branch of the case. In addition to this, it was allowable to introduce the answer mentioned because the complaint in the action of Rutt against the present plaintiff was a detached writing for the proper explanation of which the admission of the answer was necessary.

3, 4. Under the authority of *Ah Doon* v. *Smith,* 25 Or. 89 (34 Pac. 1093), the cross-examination of a witness is part of the case of the party for whom he testifies. The admission of the papers not being erroneous, the court was authorized to consider them as part of the plaintiff's case in chief, and to draw from them the conclusion of fact that Rutt was not within the terms of

the policy so as to call upon the defendant for indemnity for an injury happening to him. It is not strictly a case of the defendant establishing an affirmative defense within the meaning of *Hildebrand* v. *United Artisans,* 50 Or. 159 (91 Pac. 542), and *McGregor* v. *Oregon R. & N. Co.,* 50 Or. 527 (93 Pac. 465, 14 L. R. A. (N. S.) 668), cited by the plaintiff. It was incumbent here upon the Warehouse Company to prove that Rutt was a person within the terms of the policy at the time he received the injury, and the defendant was entitled to break down its opponent's case on the testimony by cross-examination with the result that the plaintiff failed to prove a case sufficient to be submitted to the jury. We deem it unnecessary to consider the other grounds specified in the motion to the effect that it had not been shown that the plaintiff had paid the Rutt judgment in money. The nonsuit was right and must be affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE BENSON concur.

Argued July 17, affirmed September 25, 1917.

IN RE WILSON'S ESTATE.

(167 Pac. 580.)

Courts—Executors and Administrators—Jurisdiction—Instructions to Executors—Construction of Will.

1. Under Article VII, Section 12 of the Constitution, giving County Courts the jurisdiction pertaining to probate courts, and Sections 934, 936 and 1303, L. O. L., relative to the jurisdiction of such courts and to the distribution and payment of legacies, the County Court, in response to a petition of the executors, may direct them to whom property shall be distributed, and, as incidental to this direction, may construe the will.

Wills—Ambulatory Character and Revocability.

2. The provisions of a will are subject to change at any time before the death of the testator by making a new will or codicil or by a sale of the property devised or bequeathed or by consuming and destroying it.

Corporations—Dividends—Persons Entitled—Transfer of Stock.

3. A dividend is usually considered a part of the corporate property until declared, and will pass with the sale or devise of the stock, but when the dividend is declared, it becomes separate and distinct from the stock, and falls to him who is proprietor of the stock of which it was before an incident.

Wills—Rights of Legatee of Stock.

4. A legatee of shares of stock takes the stock as it was at the time of the testator's death.

Corporations—What Constitutes "Dividend"—Necessity of Formal Declaration.

5. Where pursuant to formal resolutions a corporation having no debts conveyed property, and upon the receipt of the consideration for the conveyance it was divided between the two individuals who owned all of the stock, except one share issued to a third person to qualify him as director, and they thereafter treated the funds received as their own, this amounted to a "dividend," as a division of profits, without the formality of declaring a dividend is equivalent to a dividend.

[As to when dividend becomes enforceable debt against corporation, see note in **Ann. Cas.** 1913B, 553.]

Corporations—Meetings of Directors—Place of Meeting—Ratification.

6. The informality of a corporate meeting held outside the state may be waived by the shareholders and the act ratified by their subsequent consent and acquiescence.

Corporations—Ratification of Acts of Officers.

7. A voidable act by the officers of a corporation may be ratified by the stockholders so as to estop the corporation from afterwards maintaining an action to undo it.

Corporations—Ratification of Acts of Officers.

8. Where the owners of all the stock of a corporation divided the proceeds of a sale of corporate property and thereafter treated the funds received as their own, the corporation ratified this division of the proceeds by failing to disavow it after knowledge.

Wills—Specific or General Bequest.

9. A bequest of all the stock in a corporation "which I may own at the time of my death" is a specific bequest.

Wills—Time from Which Will Speaks.

10. A will speaks only from the death of the testator, unless a contrary intention is manifested from the language of the will or its provisions.

Wills—Bequest of Stock—Effect of Division of Profits.

11. A testator who with another owned all the stock of the corporation bequeathed his stock in the corporation in trust for certain parties, giving his residuary estate to other parties. After the execution of the will the corporation made a sale of property and the two stockholders divided the proceeds of the sale between themselves, and thereafter treated the fund so received as their own. *Held*, that the fund so received by the testator was his property and the property of his estate, and to be distributed in accordance with the will as property of his estate, and not restored to the corporation in order that it might inure to the benefit of the legatee of the stock.

Executors and Administrators—Actions—Costs.

12. Where a proceeding and a suit by executors for a construction of the will of their testator were brought in an honest endeavor to properly administer the estate according to a legal construction of the will, the costs should be borne by the estate as other expenses of administration.

From Multnomah: GEORGE R. BAGLEY, Judge.

In Banc. Statement by MR. JUSTICE BEAN.

This controversy involves the proper construction of the will of Richard Wilson, deceased, and arose substantially in the following manner: On March 1, 1912, Richard Wilson made his will, the provisions of which are in effect as follows: By Article First he directed the payment of his funeral expenses and debts; by Article Second he devised and bequeathed to his wife, Esther B. Wilson, his home in the City of Portland, and its contents, and also all the United States government bonds which he might own at the time of his death; by Article Third he devised and bequeathed to his brother, George Wilson, 664 acres of land near the town of Gresham, in Multnomah County, Oregon, together with the poultry, livestock, farm implements and other personal property thereon; also a half section of land in Gilliam County, Oregon; by Article Fourth he bequeathed to Carl Berg $2,000 to be paid within one year after his death. Articles Fifth, Sixth and Seventh, which have a bearing upon this controversy, we quote at length:

"Article Fifth.

"I hereby give, devise and bequeath unto my executors, hereinafter named, the following described property, to wit:

"1. All of the stock which I may own at the time of my death in the following institutions: (1) The 'First National Bank' of Wallace, Idaho; (2) 'The Exchange National Bank' of Spokane, Washington; (3) the 'Title and Trust Company' of Portland, Oregon; (4) the 'Columbia Life & Trust Company' of Portland, Oregon; (5) and the 'Eubanks Transmission Company' of Portland, Oregon:

"In trust nevertheless for the following uses and purposes:

"It is my wish, and I hereby direct that my said executors shall care for said above described stock, and collect the income therefrom promptly when due, and direct that they distribute such income annually as follows, to wit:

"1. Fifteen per cent (15%) of such income to each of my following named nephews: Harry Noad, of Crampton, Ontario, Canada; William Noad, of Crampton, Ontario, Canada; Richard Noad, of Crampton, Ontario, Canada; Max Noad, of Harriettsville, Ontario, Canada.

"2. Twenty per cent (20%) of such income to each of my following named nieces, to wit: Isabella Eyre, of Crampton, Ontario, Canada; Hilda Couch, of Harriettsville, Ontario, Canada.

"Upon the death of any of said nephews or nieces, I direct that his or her share of said income shall immediately be equally divided among the issue of such deceased nephew or niece, and in case any of said nephews or nieces shall die without leaving any issue, then, and in that event, his or her share of such income shall be divided equally among his or her surviving brothers and sisters.

"I further direct my said executors that when all of my said nephews and nieces shall have died, that all of the above described stock shall be divided equally among the then living issue of my said above named nephews and nieces.

"Article Sixth.

"I hereby give, devise and bequeath unto my said executors the following described property, to wit:

"1. All of my stock in the following corporations: (1) Idaho Investment Company, an Oregon Corporation; (2) Alice Mining Company; (3) Oom Paul Mining Company; (4) Mayflower Mining Company; all of the properties of which companies are situated in the Coeur d'Alene Mining District in the state of Idaho.

"2. Also all of my right, title and interest in all of the property owned by what is known as the Tammany Mining Company in Missoula County, Montana; and also all my right, title and interest in all of the property owned by what is known as the Argo Mining Company in Granite County, Montana.

"In trust nevertheless for the following uses and purposes:

"It is my will and I direct that my said executors shall sell all of the property described in Article Sixth hereof, or any portion thereof, at such times as they may deem advisable, and I direct that they distribute the proceeds derived from the sale of any or all of such property immediately after such proceeds have been received by them, as follows, to wit:

"(a) Twenty per cent (20%) of such proceeds to the Reverend Charles Mackin of the city of Ashland, Oregon;

"(b) Twenty per cent (20%) of such proceeds to Lucilla O'Grady of 67 North 17th Street, in the city of Portland, Multnomah County, State of Oregon.

"(c) Five per cent (5%) of such proceeds to the St. Vincent Hospital, in the city of Portland, State of Oregon;

"(d) Five per cent (5%) of such proceeds to the Sacred Heart Hospital, in the city of Spokane, State of Washington;

"(f) Five per cent (5%) of such proceeds to the Providence Hospital, in the City of Wallace, State of Idaho;

"(g) Five per cent (5%) of such proceeds to St. Patrick's Hospital, in the city of Missoula, State of Montana;

"(h) Ten per cent (10%) of such proceeds to His Grace, Archbishop Alexander Christie, Archbishop of the Diocese of Oregon City, Oregon, and his successors, to be used by him or them in the building of a cathedral in the city of Portland, Oregon; and if, before my death, said His Grace, Archbishop Alexander Christie, or his successors, shall have built such a Cathedral, then said 10 per cent of such proceeds shall be used by said, His Grace, Archbishop Alexander Christie, and his successors, for the benefit of said Diocese of Oregon City, Oregon;

"(i) And twenty-five per cent (25%) of such proceeds to be used by my said executors for the purpose of paying any expenses incurred by them in the care, preservation, or sale of any or all of said property, and any balance of said 25 per cent of such proceeds remaining after the payment of such expenses, shall be delivered immediately after all such property has been sold, to the Sisters of the Holy Names of Jesus and Mary to be held by them for the use and benefit of the Saint Mary's Home for Orphan Girls, at Oswego, Oregon.

"Article Seventh.

"And all of the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, and of whatsoever nature and kind, which at the time of my decease I, or any person or persons in trust for me, am or are possessed of, or entitled to, and not hereinbefore disposed of, I give, devise and bequeath unto the Society of Jesus."

By Article Eighth he nominated and appointed his wife, Esther B. Wilson, Charles Mackin and Walter Mackay, his executors, and provided that if the law at the time of his decease so permitted the Title & Trust Company, an Oregon corporation, of Portland, should act as executor in conjunction with the others

named; by Article Ninth he directed that his executors pay the legacy of $2,000 to Carl Berg and all expenses connected with the administration of his estate out of the income derived from the United States Government bonds mentioned in subdivision 3 of Article Second and from the stock specified in Article Fifth, and the bequests of said bonds and said stock were made subject to this provision; by Article Tenth he revoked all former wills. The will was executed in due form and witnessed by Frederick M. De Neffe and James Conley of Portland.

At that time, March 1, 1912, the Idaho Investment Company was a corporation and the owner of certain mining property in Idaho, among which properties was the "Cleveland Group of Mines." The stock in this company was owned as follows: Richard Wilson, 49 shares; Walter Mackay, 50 shares; and F. M. De Neffe, 1 share, the same being placed in his name in order to qualify him to act as a director, the three stockholders being the directors of the corporation. On September 14, 1912, the Idaho Investment Company duly authorized the sale of its interest in the Cleveland Group of Mines to the Federal Mining & Smelting Company for $180,000. The sale was consummated on September 16, 1912. The purchase price was paid by check payable to the Idaho Investment Company and cashed at once in the First National Bank of Wallace, Idaho. The money was divided by mutual consent between Richard Wilson and Walter Mackay, each taking $90,000. No entry of any report of the closing of the deal nor any declaration of a dividend was made in the records of the corporation. There was no indebtedness of the Investment Company. On May 28, 1913, Richard Wilson died very suddenly in a street-car in Multnomah County, Oregon, and his

will was duly probated in the County Court. Letters testamentary were issued to the executors named in the will, with the exception of Esther B. Wilson, who declined to act, and they went into possession of the property of the estate. On December 9, 1913, the Idaho Investment Company in writing requested the executors of the estate of Richard Wilson, deceased, to return to it the sum of $90,000, that being one half of the proceeds of the Cleveland Group of Mines received by Richard Wilson in his lifetime. This act appears to have been taken solely on account of its effect upon the distribution of the property under the provisions of the will. The executors not being advised as to the claim of the Idaho Investment Company and being in doubt as to the proper construction of the will of Richard Wilson, deceased, and in order to be fully advised as to their duty in administering the estate, petitioned the County Court of the State of Oregon for advice and direction. A hearing was had in the probate court upon the issues raised by the petition of the executors, the answering petitions of several of the beneficiaries, and the testimony taken before the probate court. On April 21, 1914, the court made findings of fact and entered an order whereby it was ordered and adjudged that the Idaho Investment Company had no legal or equitable claim of any kind against the estate of Richard Wilson, deceased, and the executors were ordered and directed to proceed with the administration and distribution of the property of the estate under and in accordance with the provisions of the last will and testament of said deceased. From such order Charles Mackin, Walter Mackay, and the Title & Trust Company, as executors, Lucilla O'Grady, and the other beneficiaries named in Article Sixth of the will, with the exception

of Charles Mackin, appealed to the Circuit Court for Multnomah County and a hearing was had and a decree entered on January 5, 1916, whereby it was adjudged and decreed that the division of the sum of $180,000 between Walter Mackay and Richard Wilson was to all intents and purposes a dividend of the assets of the Idaho Investment Company, and the sum of $90,000 obtained thereby by Richard Wilson was his property and now belongs to the estate, and the whole thereof, except $5,000 invested in stock of the Eubanks Transmission Company, is the residuum of his estate and is undisposed of except under the residuary clause of his last will and testament. It was further ordered, adjudged and decreed that the executors of said last will and testament proceed with the administration of the estate and the distribution of the property thereof in accordance with the terms of the will and the decree; and that the order, judgment and decree of the County Court in substance be affirmed. From that decree this appeal is taken.

AFFIRMED.

For appellant, Lucilla O'Grady, there was a brief over the names of *Mr. Hall S. Lusk* and *Messrs. Dolph, Mallory, Simon & Gearin,* with an oral argument by *Mr. Lusk.*

For appellants, Charles Mackin, Walter Mackay and Title & Trust Company, as executors of the last will and testament of Richard Wilson, deceased, there was a brief and an oral argument by *Mr. F. M. De Neffe.*

For appellant, Convent of the Precious Blood, there was a brief over the names of *Mr. M. G. Munly* and

Mr. Robert N. Munly, with an oral argument by *Mr. M. G. Munly.*

For appellants, Archbishop Alexander Christie, St. Vincent's Hospital of Portland, Sacred Heart Hospital of Spokane, a Washington corporation, Providence Hospital of Wallace, Idaho, and St. Patrick's Hospital of Missoula, a Montana corporation, there was a brief and an oral argument by *Mr. Frank T. Collier.*

For respondent, Society of Jesus, there was a brief over the names of *Mr. J. Hennessy Murphy, Messrs. Emmons & Webster,* and *Mr. John G. Shillock,* with oral arguments by *Mr. Lionel R. Webster* and *Mr. Murphy.*

For respondents, Isabella Eyre, William Noad and Hilda Couch, there was a brief over the names of *Mr. C. A. Applegren, Mr. Arthur P. Tifft* and *Messrs. Meredith & Meredith,* with an oral argument by *Mr. Applegren.*

Mr. Justice Bean delivered the opinion of the court.

1. This proceeding is based upon a petition of two of the three executors of the last will and testament of Richard Wilson, deceased, asking the direction of the court in the distribution of the estate under the will. It is shown that the estate is ready for distribution. It is suggested by the appellants that the probate court has no power or jurisdiction to construe the will. In the administration of an estate, of which the County Court has exclusive jurisdiction in the first instance, it is necessary for that court to direct the executors how to proceed, to whom the property in

their hands shall be given, and what each shall receive. It has full power and jurisdiction to respond to such a petition by an appropriate decree. That is one of its functions and duties. It is incumbent upon that court in the disposition of a decedent's estate to collect and preserve the property, pay the debts, and distribute the personal property on hand after the obligations have been paid. In order to effect distribution the distributees and the property each is to receive must first be ascertained and determined. It is for this purpose that in the first proceedings in the administration of an estate an inventory is filed. If a question arises as to the distribution the probate court has the power to direct by its decree the manner of such distribution, and also the power to construe a will as incidental to such direction if that is necessary: Sections 934, 936, and 1303, L. O. L.; Article VII, Section 12, before the last amendment. (The jurisdiction of the County Court has not been changed since that amendment to this section of the Constitution.)

The will which is submitted as part of the petition shows many special bequests with a final residuary paragraph, and is in itself clear, definite, positive, and certain. It would seem that all that is necessary in order to know what is meant by the will is to read it: 40 Cyc., p. 1438.

2–4. As we enter upon the duty imposed, the weight of the responsibility seems lessened when we remember that the court cannot change one "jot or tittle" of the law. It is for us simply to expound it as we find it made for us and the other members of society. Crystallized for the majority it perhaps in some instances resembles ready-made clothing which does not always appear to fit exactly. In other words, the

court cannot revise or make a will for the decedent. It is the function of the court to construe the one made by him and declare its effect. It should be borne in mind that the effect of the provisions of a will is subject to change at any time before the death of the testator. This may be effected in different ways: (1) By making a new will; (2) by a codicil to the will; (3) by a sale of property devised or bequeathed, or by consuming or destroying the same. Mr. Wilson was a man of large experience and business capacity, and when the sale of the Cleveland Group of Mines was made, the money divided, and a portion of it expended by him, he must have understood that the value of the property described in the Sixth Article of the will was thereby affected. It was probably his intention to give the matter further consideration. Without sanctioning the introduction of oral evidence to disclose his intention, if we look at the same, we are convinced that his conversation with Mr. Mackay, his intimate and trusted business associate and friend, in March, two months before he died, when he said to him, "Walter, I want to make a will; will you act as one of my executors?" indicated that he meant just what he said and was referring to something to be done in the future. He died suddenly and did not thereafter do so.

In the interests of the beneficiaries named in the Sixth Article of the will it is claimed that the $180,000 received for the Cleveland mines and divided equally between Wilson and Mackay is still the property of the Idaho Investment Company, and the $90,000 so received by Richard Wilson, deceased, a year before his death, should be returned to that corporation by the executors of his estate; that the same belongs to the stockholders of that company and should go to

the beneficiaries named in the Sixth Article of the will according to its provisions. On the other hand, it is asserted that the ownership of the $90,000 passed from the corporation to Richard Wilson, now deceased, and except for $5,000 thereof invested in stock of the Eubanks Transmission Company, is the residuum of said estate and is not disposed of except under the residuary clause of the last will and testament. The pivotal question in the case is this: What was the effect of the division of the proceeds of the sale of the Cleveland Group of Mines by Richard Wilson, now deceased, and Walter Mackay, the owners of all the stock in the Idaho Investment Company, except one share which was transferred to Mr. De Neffe in order to qualify him to act as a director, and who were also two of the three directors of the corporation? Was it in effect a declaration and payment of a dividend of the profits of the corporation? 1 Cook on Stock and Stockholders (3 ed.), Section 534, says:

"A dividend is a corporate profit set aside, declared, and ordered by the proper corporate authorities to be paid to the stockholders on demand or at a fixed time."

To the same effect see *Williston* v. *Michigan So. etc. R. R. Co.*, 13 Allen (Mass.), 400; *De Koven* v. *Alsop*, 205 Ill. 309 (68 N. E. 930, 63 L. R. A. 587, 590). A dividend is usually considered a parcel of the mass of corporate property until declared and, therefore, incident to and parcel of the stock up to the time it is declared. Before its declaration it will pass with the sale or devise of the stock. Whoever owns the stock prior to the declaration of the dividend owns the dividend also. The moment the dividend is declared then it becomes separate and distinct from the

stock and the dividend falls to him who is proprietor of the stock of which it was before incident. A transfer of stock passes all dividends declared subsequent to the transfer. A legatee of shares takes the stock as it was at the time of the testator's death: *McLaran* v. *Crescent Planing Mill Co.,* 117 Mo. App. 40 (93 S. W. 819, 821). 2 Cook on Corporations (5 ed.), Section 534, says:

"A division of the profits is a dividend even though not called such and not construed such by the directors and stockholders."

In the case of *Grants Pass Hdw. Co.* v. *Calvert,* 71 Or. 103 (142 Pac. 569), there was involved the question of whether certain property, to wit, the Layton Hotel, should be considered dividends so as to have passed out of the corporation before certain stockholders bought stock. A disposition of this property had been made and a controversy arose over the legal effect of what the stockholders and directors had done. Prior to January, 1911, Wolke, Calvert, and Patilla, then owning all the stock in the company and the officers thereof, decided that they would set this property apart as a property dividend for themselves and have a proper conveyance of it made. The company was in good financial condition. This court speaking through Mr. Justice RAMSEY said:

"All the stockholders and the directors appear to have agreed that said property should be disposed of. When they had their annual stockholders' meeting in January, 1911, the secretary made a report, and a dividend was declared, and the Layton Hotel property, valued at $3,666.66, was 'charged off' from the assets of the company, with the understanding that it should be conveyed to Patillo. * * We think that the officers of the plaintiff, when they authorized the making of said deeds, and when the deeds were executed, had knowl-

edge and notice that said property had been set apart as a dividend to be conveyed to the defendants, and that they made said deeds to carry out the said arrangement according to the intention formed by the company when the defendants and Patillo were the directors and sole stockholders thereof. We hold that the transfer of said hotel property to the defendants was, in effect, the payment of a dividend in property in accordance with the previous action and intention of the company. While the proceedings relating thereto, prior to the execution of the deeds, were not very formal, yet the evidence shows what the intention was, and the execution of the deeds carried out that intention fully."

5. This last case is very much in point. The evidence clearly shows that at the time the mines were sold, Mr. Mackay and Mr. Wilson declared that they might as well divide the proceeds, decided how they should be divided, and they did so divide them. It was in fact a dividend. It seems that there could be no question but that these two men intended the same to be a dividend of the assets of the corporation which they treated as profits. No one else had a right to say nay. No one did say nay. Their actions stood unchallenged during the remainder of the life of Mr. Wilson. Formal resolutions of the corporation authorizing the execution of the deed of the mines had been regularly adopted and entered in the corporate records and it is apparent that as the transaction was had according to the wishes of the only interested parties they considered that there was no reason for further formality. They each proceeded to treat the funds received for the mines as their own and Mr. Wilson with a portion of the money purchased shares of stock in the Eubanks Transmission Company which were bequeathed by the Fifth Article of the will. A division of profits without the formality of declaring

a dividend is equivalent to a dividend: 2 Cook on Corporations (5 ed.), § 534, p. 1136; *Hartley* v. *Pioneer Iron Wks.,* 181 N. Y. 73, 79 (73 N. E. 576).

6–8. The informality of a meeting held outside the state may be waived by the shareholders and the act ratified by their subsequent consent and acquiescence: 10 Cyc. 1193. A voidable act by the officers of the corporation may be ratified by the stockholders so as to estop the corporation from afterwards maintaining an action to undo it: *Little* v. *Garabrant,* 90 Hun (97 N. Y. S. C. R.), 404 (35 N. Y. Supp. 689), affirmed in 153 N. Y. 661 (48 N. E. 1105); *St. Croix Lumber Co.* v. *Mittlestadt,* 43 Minn. 91 (44 N. W. 1079); *Martin* v. *Niagara Falls Paper Mfg. Co.,* 44 Hun (51 N. Y. S. C. R.), 130, affirmed in 122 N. Y. 165 (25 N. E. 303); *Chicago, R. I. & P. Ry. Co.* v. *Union Pac. Ry. Co.,* 47 Fed. 15. The Idaho Investment Company has, and had there been any other shareholders except Mr. Wilson and Mr. Mackay interested, they would have ratified the division of the proceeds of the mines by having failed properly to disavow the same after knowledge: 10 Cyc., p. 1075; *Finnegan* v. *Pacific Vinegar Co.,* 26 Or. 152, 155 (37 Pac. 457); *Silsby* v. *Strong,* 38 Or. 36, 42 (62 Pac. 633); *Marsters* v. *Umpqua Oil Co.,* 49 Or. 374, 378 (90 Pac. 151, 12 L. R. A. (N. S.) 825).

9, 10. Where an individual owns practically all the stock of a corporation and controls all its operations, the corporation and the individual are in proper cases regarded by the courts as one and the same: *Smith* v. *Moore,* 199 Fed. 689, 697 (118 C. C. A. 127); *Linn & Lane Timber Co.* v. *United States,* 196 Fed. 593 (116 C. C. A. 267); *Groh's Sons* v. *Groh,* 80 App. Div. 85 (80 N. Y. Supp. 438). The statement in the Fifth Article of the will "all of the stock which I may own

at the time of my death" is sufficiently definite and certain to make clear the testator's intention and require such stock to be considered as a specific bequest: *Noon's Estate,* 49 Or. 286, 293, 294 (88 Pac. 673, 90 Pac. 673); 1 Underhill on Wills, § 408; 1 Cook on Corporations (5 ed.), § 302; 40 Cyc., pp. 1869, 1872. A will speaks only from the death of the testator unless a contrary intention is manifest from the language of the will or its provisions: *Gerrish* v. *Hinman,* 8 Or. 348; *Morse* v. *Macrum,* 22 Or. 229 (29 Pac. 615, 30 Pac. 73). The will of Richard Wilson cannot be attacked on the ground that the testator in his lifetime diminished or encumbered any of the bequests made: Section 7323, L. O. L. If the testator had owned a band of horses and, instead of bequeathing all this stock in the Idaho Investment Company, had bequeathed all his horses, no one would contend that such a provision would be changed or affected by any other expression of intention outside the will itself, in case the testator had disposed of all his horses. Let us suppose that one of the mines owned by the Idaho Investment Company which was not sold and the ownership of which passed with the ownership of the shares of stock in that corporation devised by the Sixth Article of the will had been increased in value to the amount of $1,000,000 after the making of the will on account of the development of an adjoining mine, would anyone contend that the same would not rightly belong to the beneficiaries named in the Sixth Article? We think the same rule must be applied whether the value of such shares is increased or diminished. When Richard Wilson made his will it does not seem that he considered that the control of any of the property which he owned, or the right to sell and dispose of the same as he pleased, was in any

way affected. The transaction which took place when the check for $180,000 in favor of the Idaho Investment Company was received is described by Mr. Mackay as follows:

"Q. When the money was paid just tell the court what you and Mr. Wilson did about it.

"A. Well, we went to the Federal Company's Mining and Smelting office, we transacted the business, surrendered the deed and got a check for $180,000.

"Q. The check was to whom?

"A. The Idaho Investment Company.

"Q. And the deed was executed by the Idaho Investment Company?

"A. Yes, sir. He was a director of the First National Bank and I was a stockholder and it was after banking hours and I went in the back way, into the back room, and we indorsed the check and he went in the front part of the bank. He said, 'Walter, we might as well divide this.' I says, 'Yes.' He says, 'How will we divide it?' I says, 'I guess we had better halve it.' He went out into the front part of the bank and brought me out a deposit check for ninety thousand dollars and he deposited ninety thousand dollars for himself.

"Q. Who indorsed the check 'Idaho Investment Company?'

"A. He indorsed it as president and I indorsed it as treasurer."

The only question that can be raised in regard to the disposition of the funds received for the mines relates to the means adopted to accomplish the result. Walter Mackay and Richard Wilson, as the owners of all the stock, had the right and power to divide that money as they did, but it is contended that they did not take the proper formal legal steps to do so. Such an objection could be made if anyone else had an interest in the matter other than these two men. Where all the interests agree and all affirmatively act together

to accomplish a result desired by all of them, any formality becomes unnecessary. As was said by Mr. Justice BENSON in *Mann* v. *W. A. Gordon Co.*, 77 Or. 457 (151 Pac. 704), quoted from Mr. Justice BURNETT, in *Markham* v. *Loveland,* 69 Or. 451 (138 Pac. 483):

"Under modern business conditions, where the commonest every-day transactions are corporate acts, it would be intolerable if everything were required to be proved by a special resolution of the board of directors in each instance."

See, also, *McDonald* v. *Williams,* 174 U. S. 397 (43 L. Ed. 1022, 19 Sup. Ct. Rep. 743).

11. We conclude that the disposition of the $180,000 by two of the three directors, who were the real owners of all the shares of stock when they declared that it should be divided and should be halved, was, in substance and effect, a declaration and payment of a dividend of the assets of the corporation. It was made in the State of Idaho, but it was acquiesced in and acted upon after the return of the parties to the State of Oregon. They did not deem it necessary to make a report of it to anyone as no one else was materially interested in the matter. The two men conducted the business much the same as though it had been a partnership. Each was perfectly satisfied with the result. The money was apparently afterwards considered as the individual property of each and a portion was so invested and used by Mr. Wilson. After the death of one it is too late to brand the transaction as a wrong on account of an informality of which no one at the time had a right to complain or with which to interfere. The $90,000 obtained thereby by Richard Wilson was his property and that secured with a portion thereof, and the funds remaining, are now the property of his estate and should be distrib-

uted in accordance with the provisions of the will. The decree of the trial court is therefore affirmed.

12. In this proceeding and in the separate suit brought by the executors to have the will of Richard Wilson, deceased, construed, an honest endeavor is made for the proper administration of the estate of the decedent according to a legal construction of his last will and testament and the costs should be borne by the estate as other expenses of administration; and it is so ordered. AFFIRMED.

MR. JUSTICE MOORE did not take any part in the consideration of this case.

Submitted on briefs September 18, modified September 25, 1917.

MACLEAY ESTATE CO. *v.* MILLER.

(167 Pac. 575.)

Costs—Cost Bill—Objections.

1. Sections 569, 570, L. O. L., providing for the taxing of costs and disbursements, declare that no disbursements shall be allowed to any party, unless he shall serve upon such adverse party or parties as are entitled to notice by law, and file with the clerk five days after rendition of judgment, his statement, with proof of service, if notice to the adverse party is required, showing with reasonable certainty the items of all disbursements, that the statement of disbursements thus filed and costs shall be entered as of course by the clerk as part of the judgment or decree, unless the adverse party, within five days from the expiration of the time allowed to file such statement, shall file his objections thereto, and that, as soon as convenient after objections are filed, the court or judge thereof shall proceed to hear and determine all the issues involved. Defendants served on plaintiff a bill of costs and disbursements, and on the following day plaintiff filed its objections. Several days thereafter, within the time limited, defendants filed their cost bill, which had already been served. *Held*, that as the cost bill was duly filed, and the objections were directed to it, they will not be disregarded because they were filed before the cost bill itself was filed.

Costs—Allowance—Witness Fees.

2. Section 566, L. O. L., declares that a party entitled to costs shall recover all necessary disbursements, including the fees of officers

and witnesses. Section 567 declares that in a suit in equity costs and disbursements shall be allowed to the party in whose favor a decree is given in an action. *Held*, that the disbursements are to be confined to what is necessary, and where defendants by their answer showed that a suit apparently to settle a disputed boundary involved a title to land, and that the ordinary action of ejectment was proper, and the court, having sustained their contention, dismissed the suit, defendants are not entitled to claim as costs and disbursements fees paid witnesses.

From Curry: JOHN S. COKE, Judge.

Suit by Macleay Estate Company, a corporation, against Alfred S. Miller, Eva Miller and Elva Wood. On motion of defendants the suit was dismissed and from an order overruling objections to the cost bill, plaintiff appealed. Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Modified.

In Banc. Statement PER CURIAM.

This was a suit in equity apparently for the purpose of settling a disputed boundary.

The answer which was unchallenged by the plaintiff made averments showing that the real dispute was as to the title of land included within certain delimitations so that the remedy of the plaintiff, if any, was by the ordinary action of ejectment. With this state of the pleadings before it, the court, sitting in chancery, dismissed the suit on motion of the defendants for want of equitable jurisdiction. Thereupon they served upon the plaintiff a bill of costs and disbursements claiming, among other items, $77.10, for fees of witnesses. The next day after this service, the plaintiff filed its objections to the cost bill attacking the witness fees and claiming also that the filing fee of the defendants was properly $2.50 instead of $5.00. Several days later than this, the defendants filed their cost bill which had been served as stated. Afterwards, the

matter was submitted to the court on the cost bill and objections; whereupon an order was entered to the effect that the objections to the cost bill of the defendants be overruled; but the court did not make or file with the clerk an itemized statement of the costs and disbursements as allowed. From this decision the plaintiff appealed. MODIFIED.

For appellant there was a brief over the name of *Mr. J. C. Johnson.*

For respondents there was a brief by *Mr. Collier H. Boffington.*

Opinion PER CURIAM:

1. The procedure relating to demands of this sort and contests thereupon is prescribed in Sections 569, 570, L. O. L. A party claiming costs and disbursements may file his bill without serving the same, unless otherwise required by rule of court, within five days after the rendition of the judgment. After the expiration of that period, but not later than the first day of the next regular term, the statement of disbursements may be filed, but in such case it must be served on the adverse party whether he has appeared or not. Within five days from the expiration of the time allowed to file such a statement the adverse party shall file his objections thereto. The statement of disbursements and the objections constitute the sole pleadings in this ancillary litigation. The court or judge is then required to hear the matter and, as soon as convenient thereafter, shall make and file with the clerk a correct itemized statement of the costs and disbursements as allowed and shall render judgment thereon accordingly for the party in whose favor the same were allowed.

This is conclusive as to all questions of fact, but an appeal may be taken from the decision of the court or judge on the allowance and taxation of costs and disbursements on issues of law only.

The service of the cost bill was a notice to the plaintiff of the amount to be claimed by the defendants. It then had five days after the filing of this statement within which to file its objections. Although they were filed before the cost bill itself was filed, yet the objections were in fact before the court as well as the bill itself. If the defendants considered them improvidently filed, their remedy was by motion to strike them out the same as though they had not been properly verified or there was some other objection to the form of the pleading rather than to the substance. With this statement of disbursements on the one hand and the objections thereto on the other in very truth before it, the court should have considered them on their merits in the absence of a motion to strike out the objections as not being filed in the proper time. Of course, if the cost bill had not been filed at all after having been served, the objections would have been inert; but it would be sacrificing substance to form to decline to consider them with the bill filed as it was, in the absence of a motion to strike them out.

2. The court should have made a detailed statement of costs and disbursements proper to be allowed. The judgment was erroneous in this respect and it becomes our duty therefore to make such a correct statement. Section 566, L. O. L., grants to a party entitled to costs the right to recover all necessary disbursements including the fees of officers and witnesses and the like: In a suit in equity, costs and disbursements are allowed to the prevailing party unless the court shall otherwise order: Section 567, L. O. L. The disbursements, how-

ever, are to be confined to what is necessary. In the issue presented to the court the decision of which was determinative of the litigation, no question of fact was involved. The decision rested solely on a matter of law. Witnesses were not at all necessary in the trial of such a dispute. All claim for such items must therefore be disallowed. No error is assigned respecting the objection to the filing fee; hence that matter will not be considered. On the whole case, therefore, from the record before us, we find that the judgment concerning costs and disbursements should be modified and that they should be taxed in favor of the defendants as to the matters occurring in the Circuit Court as follows:

Clerk's fees	$ 5.00
Costs	10.00
Notary's fees	1.00
Total	$16.00

It is so ordered. MODIFIED.

Submitted on briefs September 19, affirmed as modified September 25, 1917.

ANDERSON v. PHEGLEY.

(167 Pac. 570.)

Appeal and Error—Remand—Proceedings Below.

1. Where, on appeal, defendant's motion to vacate decree and permit an answer is disposed of adversely to her, the trial court properly denied such a motion after entry of decree in conformity to the mandate.

Trusts—Enforcement—Supplemental Pleading—Expenses During Suit.

2. The remedy of a defendant, who, pending a suit resulting in a decree that property was held on a trust agreement, was compelled

without assistance to bear the expense of preserving the property, redounding to the benefit of plaintiffs, as well as such defendant, is by application to the trial court for leave to file a supplemental pleading, to the end that the expenditures may be established as a necessary and proper expense, and charged against the property, and paid as other costs and disbursements of the suit.

From Josephine: FRANK M. CALKINS, Judge.

Originally this was a suit by T. E. Anderson, T. K. Anderson, as administrator of the estate of H. A. Williamson, deceased, substituted for said deceased, and Albert Phillips, against Grant Phegley and Emma G. Robinson. From an order denying the motion of Emma G. Robinson to set aside the decree and allow an answer to be filed, she appeals. Submitted on brief under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Affirmed as modified.

For appellant there was a brief over the name of *Messrs. Beach, Simon & Nelson.*

No appearance for plaintiffs-respondents.

In Banc. MR. JUSTICE BEAN delivered the opinion of the court.

1. This is an appeal by defendant, Emma G. Robinson, from an order denying a motion to vacate a decree entered in conformity with the mandate of this court issued upon rehearing. The original opinion in this case is reported in 71 Or. 331 (142 Pac. 593), and that on rehearing in 74 Or. 388 (145 Pac. 642). At page 398 of the latter opinion this court, speaking by Mr. Justice HARRIS, said:

"This court has decided the issues presented on the entire record as that record was made by the parties. Every issue raised by the pleadings, every question presented by the record, and every right asserted in the pleadings or claimed from the evidence by any of

the litigants has been decided and determined. The case as made by the record has been fully adjudicated, and this court cannot now remand the cause for the purpose of framing what would be equivalent to a new case.''

The motion to vacate the decree and permit an answer to be filed was disposed of at that time. The order of the lower court denying the same is affirmed.

2. Defendant, Emma G. Robinson, shows by a verified motion and affidavit that on account of the abandonment of the property by plaintiff Anderson, she was compelled to and did defray the expenses of the assessment work and maintenance of the properties which were the subject matter of the contracts in litigation and expended large sums of money in the preservation and protection thereof; that the property involved in this suit consists of mining claims and that under the laws of the United States of America it was necessary in order to preserve the same that considerable sums of money be spent thereon; that said claims are thirty or more in number, and that this defendant without assistance from any other parties in the cause was compelled to and did during a long period of years, bear said burden; that under the decision of the Supreme Court of the State of Oregon declaring the agreement set forth in the complaint herein to be a trust agreement, the expenditures redounded to the benefit of the plaintiffs herein as well as to this defendant, and should be charged against the property, and this defendant should be reimbursed for the same out of the first proceeds of the sale thereof.

The suit was commenced November 9, 1910, and a decree was entered on January 1, 1915, upon the mandate reissued by this court. Defendant's remedy as to this part of the motion should be to apply to the trial

court by making appropriate supplemental allegations in regard to the matter and amounts of the expenditures made during the pendency of the suit and properly serve the same. In case of issues being raised in regard thereto the same should be heard and determined to the end that if in equity reimbursement should be made for any necessary and proper expenses incurred to protect and sustain the life of the property which was the subject matter of the suit during the pendency thereof, the same may be charged against such property and paid as other costs and disbursements of the suit. The motion filed may be treated as an application to file such a supplemental pleading and leave is granted to do so; and it is so ordered. Neither party will recover costs upon this appeal.

AFFIRMED AS MODIFIED.

Submitted on briefs September 18, affirmed September 25, 1917.

QUINN *v.* HAWLEY PULP & PAPER CO.

(167 Pac. 571.)

Master and Servant—Injuries to Servant—Actions—Instructions.

1. In a servant's action for injuries, an instruction that, "if the work that the plaintiff engaged in was not work involving a risk or danger then any contributory negligence on the part of the plaintiff which contributed to approximately bring about the accident, then the plaintiff would not be entitled to recover anything on this action, provided of course that the contributory negligence of the plaintiff must have been in one or more of the respects as set forth in defendant's answer," was properly refused as tending to confuse the jury.

Trial—Instructions—Evidence to Support.

2. While a party is entitled to have his theory of the case presented to the jury under proper instructions, there must be some testimony tending to support such theory.

Master and Servant—Injuries to Servant—Safe Place to Work—Injury Avoidable by Master's Care.

3. If the process used by the employer was such as in fact to cause hurt to the employee when it was practicable to obviate the danger, its long continuance does not make the master less culpable.

Trial—Instructions—Evidence.

4. Evidence in a servant's action for injuries when piles of baled paper fell upon him *held* to warrant refusal of instruction based on theory that the plaintiff's work did not involve risk or danger within the Employers' Liability Law (Laws 1911, p. 16).

[As to duty and liability of master to night watchman, see note in **Ann. Cas.** 1912C, 1036.]

From Clackamas: JAMES U. CAMPBELL, Judge.

In Banc. Statement by MR. JUSTICE BURNETT.

The complaint alleges the corporate character of the defendant and that at the time of the injury complained of the plaintiff was employed as a watchman by the defendant so that the relation of employer and employee then existed between them. Then follow these averments:

"That on the 12th day of March, 1914, while plaintiff was engaged in performing the duties imposed upon him by said defendant, and while acting under instructions from said defendant, said plaintiff attempted to close a large sliding door on the easterly side of what was known as Mill 'C' and at said time and place, large bundles of manufactured paper, each bundle weighing approximately 125 pounds, had been piled to a height of approximately nine feet and had been piled in such close proximity to the said sliding door that the top of said pile leaned over and against the said sliding door, all through the carelessness, recklessness and negligence of said defendant, and on account thereof, several of said bundles of said paper fell from the top of said pile upon and against this plaintiff, injuring him in the manner hereinafter described; that the place where said plaintiff was required to work was dangerous and involved risk and

he was required to work around said heavy bundles of paper so dangerously and negligently piled as aforesaid and said defendant failed and neglected to use every device, care and precaution which was practicable to be used for the protection and safety of life and limb; and said defendant was careless, reckless and negligent in requiring said plaintiff to work in said dangerous place; and said defendant was careless, reckless and negligent in not preventing said heavy bundles of paper from being piled in the said negligent and dangerous manner and in not warning this plaintiff of said danger; and said defendant could have erected between said sliding door and said pile of bundles of paper, stanchions or pieces of timber running from the ceiling to the floor of the room in said Mill 'C' which would prevent the said pile or the said bundles of paper from leaning against said sliding door and from being piled in the said dangerous manner, all of which could have been done without interfering in any way with the efficiency of the structure or other apparatus or device. As a direct result of the negligence herein alleged, plaintiff was injured as hereinafter described."

The injuries suffered by the plaintiff and their effect are particularly described.

The answer admits that the plaintiff

"at the time of the accident complained of was a watchman employed by this defendant and on the 12th day of March, 1914, received an injury at the mill of the said defendant in Oregon City, at that portion of said mill known as Mill 'C' by certain bundles of paper falling upon or about the said plaintiff."

The defendant denied all the other allegations of the complaint, except its own corporate existence. The further answer attributes the hurt to the plaintiff's own carelessness, alleges that knowing all the situation he assumed the risk of the employment, and

lastly that the injury was the result of a pure and unavoidable accident.

The new matter of the answer is traversed by the reply. A jury trial resulted in a verdict and judgment in favor of the plaintiff from which the defendant appeals.

Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). AFFIRMED.

For appellant there was a brief over the names of *Messrs. Wilbur, Spencer & Beckett* and *Mr. G. A. Gore.*

For respondent there was a brief over the names of *Messrs. Griffith, Leiter & Allen,* and *Mr. Frank J. Lonergan.*

MR. JUSTICE BURNETT delivered the opinion of the court.

The testimony on behalf of the plaintiff showed, in substance, that while he was engaged in making his round as watchman for the defendant company he found the door leading into Mill "C" open and, as required by the duties of his station, proceeded to close it. It was what is known as a sliding door hung upon overhead rollers. The paper was in bales weighing about 125 pounds each and was piled up to a height of about 8 or 9 feet and in such close proximity to the door that on undertaking to close it four of them fell down upon the plaintiff and injured him in the manner described in the complaint. The only testimony on behalf of the defendant was that of two employees who testified substantially that they piled the paper in the usual way. It was shown in testimony, for the purpose of proving that it could be done, that after the accident the company caused stanchions to be

erected against which the paper could be piled without in any way interfering with the operation of the door or the storage of the bales. The defendant maintains as its theory of the case that this was not a work involving risk or danger and, hence, did not come within the operation of the employer's liability law. The excerpt from that statute applicable to this case reads as follows:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

1, 2. The instruction propounded by the defendant to raise this question is here quoted:

"If the work that the plaintiff engaged in was not work involving a risk or danger then any contributory negligence on the part of the plaintiff which contributed to approximately bring about the accident, then the plaintiff would not be entitled to recover anything on this action, provided of course that the contributory negligence of the plaintiff must have been in one or more of the respects as set forth in defendant's answer."

This requested charge is so involved that instead of enlightening the jury it would have tended to confuse them and hence on that ground alone was properly refused. It is true that a party is entitled to have his theory of the case presented to the jury under proper instructions: *Fiore* v. *Ladd,* 25 Or. 423, 425 (36 Pac. 572); *Farmers' etc. Nat. Bank* v. *Woodell,* 38

Or. 294, 307 (61 Pac. 837, 65 Pac. 520); *State* v. *Smith*, 43 Or. 109, 114 (71 Pac. 973); *Cerrano* v. *Portland Ry., L. & P. Co.*, 62 Or. 421, 427 (126 Pac. 37). This, however, is qualified by the requirement that there must be some testimony tending to prove the theory of the party complaining. The reason of this is that the jury is charged with the duty of considering the testimony. To aid them in so doing the court instructs them as to the law applicable thereto. If there be no evidence to which the requested charge properly may be applied, to give it would be confusing to the jury as an abstraction, foreign to the case.

3, 4. The testimony on behalf of the plaintiff was utterly undisputed. It showed that he was injured while in the usual prosecution of his employment. We thus have a situation delineated by the evidence on his behalf where, in the discharge of his duty in the customary manner, he was injured by the falling upon him of the paper so piled as to cause that result by the closing of the door. That the bales were stacked up in the usual way does not controvert the showing of the plaintiff. If that was the habitual method of storing the paper, the wonder is that some one was not hurt before the injury in question. If the process used was such as in fact to cause hurt to the employee, when it was practicable to obviate the danger, its long continuance does not make it less culpable. There was, therefore, no theory of the case to which the requested charge, even if properly stated, would have been applicable; hence it was not error to refuse it. The case stated and proved by uncontroverted testimony lies clearly within the purview of the enactment under consideration. The instructions given and assigned as error are proper statements of the law as declared by the statute mentioned. In brief, there was nothing in

the testimony taking the case out of the operation of the employer's liability law, and hence it was not error to refuse to go into the abstract question predicated upon the theory that the work was not one involving a risk or danger. The judgment is affirmed.

AFFIRMED.

Argued September 5, affirmed September 11, rehearing denied October 3, 1917.

ALLEN v. THE PEOPLE'S AMUSEMENT CO.

(167 Pac. 272.)

Pleading—Demurrer—Misjoinder—Contract and Tort.

1. A complaint, pleading separately (1) an alleged breach of contract arising out of the purchase of tickets to a theater, and (2) removal to the lobby by the use of force and violence, was demurrable in view of Section 68, L. O. L., making a demurrer the method of attacking a misjoinder of causes of action.

From Multnomah: George N. Davis, Judge.

Action by William D. Allen against The People's Amusement Company, a corporation, in which a demurrer to the complaint was sustained and plaintiff refusing to amend, judgment was rendered dismissing the action and plaintiff appeals. Affirmed.

Department 1. Statement by MR. JUSTICE BENSON.

This is an action wherein plaintiff seeks to recover damages by reason of the fact that after having purchased tickets of general admission to defendant's playhouse he and his wife, who were colored people, were not permitted to occupy seats on the ground floor, but were directed to seat themselves in the gallery. When they refused to do so, it is alleged that they were removed to the lobby of the theater by the use of force

and violence. The complaint sets out two causes of action, pleaded separately, the first being based upon the alleged breach of the contract arising out of the purchase of the tickets; and the second is founded upon assault and battery. Defendant demurred to the complaint upon the ground that several causes of action are improperly united. The demurrer having been sustained, plaintiff declined to plead further and a judgment was entered dismissing the action. Plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. McCants Stewart.*

For respondent there was a brief over the name of *Messrs. Bernstein & Cohen,* with an oral argument by *Mr. D. Solis Cohen.*

MR. JUSTICE BENSON delivered the opinion of the court.

Plaintiff's counsel in a very able and interesting argument discusses many questions which are not before us. If the demurrer was properly sustained it is neither necessary nor proper for us to go further than to so declare. By Section 68, L. O. L., a demurrer is made the method of attacking a misjoinder of causes of action. The complaint contains a demand for relief based upon a breach of contract, and another upon assault and battery which is, of course, a tort. In *Smith* v. *Day,* 39 Or. 531, 537 (65 Pac. 1055), Mr. Justice WOLVERTON says:

"It is so well settled that an action on contract cannot be united with one arising *ex delicto* that it does not require a citation of authorities to support the proposition."

The demurrer was properly sustained and the judgment is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Rehearing denied October 3, 1917.

PETITION FOR REHEARING.

(167 Pac. 272.)

On petition for rehearing. Rehearing denied.

Mr. McCants Stewart, for the petition.

Messrs. Bernstein & Cohen, contra.

Department 1. MR. JUSTICE BENSON delivered the opinion of the court.

Plaintiff urges a rehearing in this case because the opinion does not discuss the action of the trial court in striking out portions of the complaint before sustaining the demurrer. We have held that the demurrer was properly sustained and have affirmed the judgment. This constitutes a final disposition of the case and any comments which we might now make would be *mere dicta* and not of controlling force. Many interesting questions are discussed in the briefs which in a proper case will be considered by this court, but there is nothing in the record before us to justify a rehearing and it is therefore denied.

REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

Reversed October 3, 1917.

SHEPHERD v. INMAN, POULSEN LUM. CO.

(167 Pac. 758.)

Costs—On Appeal—Expense of Transcript—Taxation.

1. Expense of a stenographic transcript of testimony used on appeal must be claimed and taxed in the Circuit Court, and cannot be taxed as a disbursement in the Supreme Court.

Costs—On Appeal—Expense of Transcript.

2. Plaintiff filed a supplementary cost bill for a stenographic transcript of testimony for use on appeal after the time allowed by Section 569, L. O. L., providing that no disbursements shall be allowed a party unless he served upon the adverse party and filed with the clerk an itemized statement of his disbursements "within five days after the rendition of the judgment," but providing that such statement may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term after the expiration of the said five days, and that such statement shall be entered by the clerk "as a part of the judgment" in favor of the party entitled to costs. Section 931, L. O. L., provides that when shorthand notes shall have been taken in any case, if the court or either party requests a transcript, the expense thereof shall be paid forthwith by the party ordering the transcript, "and when paid shall be taxed as other costs in the case." *Held*, that the expense of such transcript may or may not be taxable, depending upon whether the judgment is reversed or affirmed, but in no event can become a part of the original judgment, and the bill was filed prematurely, the time within which the supplementary cost bill can be filed commencing to run from the date of the entry of judgment on the mandate, and that, if judgment is affirmed, the item cannot be taxed as a disbursement, or become part of the original judgment, but, if reversed, the item is taxable as a part of the new judgment rendered on the mandate.

From Multnomah: GEORGE N. DAVIS, Judge.

Department 1. Statement by MR. JUSTICE HARRIS.

After a trial consuming five days, George S. Shepherd obtained a verdict and a judgment on September 25, 1915, for $5,500 against Inman, Poulsen Lumber Company, a corporation. On October 5, 1915, Shepherd filed a cost bill for the costs and disbursements incurred by him in the trial of the action, including fees paid to the clerk and sheriff, attorney's fees,

witness fees, and the expense of preparing certain exhibits.

An official court reporter took shorthand notes of the evidence; and upon entry of the judgment plaintiff "requested a transcript of the notes into longhand." The court reporter made and certified to a typewritten transcript of the evidence "and other proceedings in the action," but he did not deliver the transcript to Shepherd until February 5, 1916. Immediately upon delivery of the transcript Shepherd filed it with the clerk of the court for the use of the court and the parties to the action. On February 7, 1916, Shepherd prepared and served and filed in the Circuit Court a "supplementary cost bill" claiming that he was entitled to have taxed as a part of his disbursements $195.00 "for extending court reporter's notes" and 15 cents "clerk's fees filing same." The Inman, Poulsen Lumber Company objected to the supplementary cost bill on the ground that it had not been filed "within five (5) days after the rendition of the judgment herein, nor on or before the 1st day of the next regular term of the court occurring after the expiration of the said five (5) days." The Circuit Court overruled the objections to the supplementary cost bill and "ordered and adjudged that plaintiff have and recover of defendant in addition to the previous judgment herein the sum of $195.15 and that execution issue therefor"; and the defendant then appealed from the judgment allowing the disbursements claimed in the supplementary cost bill. REVERSED.

For appellant there was a brief over the names of *Mr. Fred L. Everson* and *Messrs. Cake & Cake,* with an oral argument by *Mr. Everson.*

For respondent there was a brief over the name of *Mr. William Wallace McCredie,* with oral arguments by *Mr. McCredie* and *Mr. George S. Shepherd.*

MR. JUSTICE HARRIS delivered the opinion of the court.

The only questions for decision arise out of the objections to the supplementary cost bill which was filed on February 7, 1916, as there are no objections to the cost bill filed by the plaintiff on October 5, 1915. The defendant contends that the supplementary cost bill cannot be allowed because it was not filed within the time fixed by Section 569, L. O. L. The plaintiff argues that Section 569, L. O. L., is not applicable for the reason that Section 931, L. O. L., governs and because it was impossible to know the amount of the disbursement until after the time limit prescribed by Section 569, L. O. L.

Section 569, L. O. L., provides that no disbursements shall be allowed to a party unless he shall serve upon such adverse parties as are entitled to notice by law and file with the clerk of the court "within five days after the rendition of the judgment" an itemized statement of his disbursements; but

"such statement of disbursements may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term of the court occurring after the expiration of said five days. * * The statement of disbursements thus filed and costs shall be entered as of course by the clerk as a part of the judgment or decree in favor of the party entitled to costs and disbursements"

unless the adverse party objects, and in that case the court passes upon the objection to the cost bill. The terms of court in Multnomah County are fixed by Sec-

tion 2806, L. O. L., where it is provided that a term of court shall be held

" * * the first Monday in September, the first Monday in October, the first Monday in November, and the first Monday in December."

Section 931, L. O. L., so far as it is material here reads thus:

"When shorthand notes have been taken in any case as in this act provided, if the court or either party to the suit or action or his attorney requests a transcript of the notes into longhand, the official reporter shall cause full and accurate typewritten transcripts to be made of the testimony or other proceedings, which shall, when certified to as hereinafter provided, be filed with the clerk of the court where such cause was tried for the use of court or parties. The fees of the official reporter for making such transcripts shall be fifteen cents per folio of one hundred words, and shall be paid forthwith by the parties or party for whose benefit the same is ordered, and when paid shall be taxed as other costs in the case. * * "

If the expense of extending the shorthand notes of the reporter must be entered "as a part of the judgment" which was rendered in the Circuit Court on September 25, 1915, and if such entry must be made after such judgment but within the time prescribed by Section 569, L. O. L., then the supplementary cost bill was filed too late for allowance: *Basim* v. *Wade,* 47 Or. 524, 526 (84 Pac. 387). If, however, the disbursement is not taxable "as a part of the judgment" which was rendered on September 25, 1915, but is to be taxed as a part of a judgment yet to be rendered then the supplementary cost bill was not filed too late, but it was filed prematurely.

1. It must be remembered that the transcript of the evidence was not used during the trial in the Circuit

Court; it was made and used after the trial and for the purpose of an appeal to the supreme court; it was not employed to procure the judgment rendered in the Circuit Court, but it is being used to attack that judgment. Numerous precedents have established the rule that the item claimed by Shepherd cannot be taxed as a disbursement in this court, but it must be claimed and taxed in the Circuit Court: *Delovage* v. *Old Oregon Creamery Co.*, 76 Or. 430, 438 (147 Pac. 392, 149 Pac. 317); and, hence, the only question for decision is whether the supplementary cost bill was filed at and within the proper time. In *West* v. *McDonald,* 64 Or. 203 (127 Pac. 784, 128 Pac. 818), the defendant appealed from a judgment obtained by the plaintiff and the judgment was reversed by the appellate court. The defendant filed a cost bill which included an item of $60 paid to the reporter for extending the shorthand notes. The plaintiff objected to this item of the cost bill and this court held that upon a reversal of the judgment and a return of the mandate to the Circuit Court the appellant could file in the Circuit Court a cost bill including an item for the expense of transcribing the evidence. It is true that in the instant case Shepherd is the only party who was entitled to file a cost bill for the expenses incurred in the trial in the Circuit Court because he was the prevailing party there, and yet there is an analogy between the facts in *West* v. *McDonald,* 64 Or. 203 (127 Pac. 784, 128 Pac. 818), and the situation here. This is an action at law and the expense of extending the shorthand notes may or may not be taxable, depending upon whether the judgment is reversed or affirmed: *Lemler* v. *Bord,* 80 Or. 224, 231 (156 Pac. 427, 1034); but in no event can this item become a part of the judgment of September 25, 1915. If the judgment is affirmed the item claimed

by Shepherd cannot be taxed as a disbursement and hence cannot enter into and become a part of the judgment rendered in the Circuit Court. If the judgment is reversed the item is taxable but it cannot enter into or become a part of the judgment of September 25, 1915, because that judgment is set aside and gives way to a new judgment which is entered on a mandate from this court.

2. The time within which the supplementary cost bill can be filed commences to run from the date of the entry of a judgment on the mandate. The supplementary cost bill was filed prematurely and the Circuit Court erred in allowing the item. If the judgment of September 25, 1915, is reversed then Shepherd can file a cost bill for the expense of extending the shorthand notes; provided, he files a cost bill after the entry of a judgment on the mandate and within the time permitted by Section 569, L. O. L.

The rule announced and applied here is fair to litigants, is consistent with previous adjudications and harmonizes Sections 569 and 931, L. O. L., so as to give force and effect to each. The instant case affords an apt illustration of the harsh results which might follow from any other construction of the statutes relating to costs and disbursements. Shepherd had sixty days from the entry of the judgment within which to appeal: Laws 1913, c. 319. He served a notice of appeal on November 20, and filed it November 22, 1915. He appealed within the time allowed by law. The expense of transcribing the testimony was incurred for the sole purpose of aiding an appeal and the disbursement can be claimed only because it is in aid of an appeal. Shepherd could not have filed a cost bill for this item before giving notice of an appeal. To apply the doctrine contended for by the defendant would be

equivalent to saying to Shepherd: If you wished to preserve your right to be reimbursed for the expense of transcribing the evidence you should have appealed and filed your supplementary cost bill not later than the first Monday in November, 1915, although to have done so would have shortened the time allowed to you by law for appealing; or if you preferred to deliberate the full sixty days allowed for appealing before making up your mind to appeal you did so at the risk of losing your right to be reimbursed for the expense of extending the shorthand notes. On the other hand the rule applied by us does not compel a litigant to shorten the time for appeal and thus abridge the statutory right of appeal in order to save the statutory right to disbursements or to choose the alternative of entirely losing the latter right in order completely to preserve the former right. The judgment on the supplementary cost bill is reversed; but, if Shepherd prevails on the appeal from the judgment of September 25, 1915, he will be entitled to file a cost bill after the entry of a judgment on our mandate. Reversed.

Mr. Chief Justice McBride, Mr. Justice Benson and Mr. Justice Burnett concur.

Argued on demurrer September 25, sustained October 3, 1917.

JOHNSON *v.* TUCKER.

(167 Pac. 787.)

Mechanics' Liens—When Perfected—Effect of Filing.

1. Although a mechanic's lien takes its origin with the furnishing of labor or materials, it is not perfected until the notice or claim of lien is filed, whereupon it relates back to the beginning when the work commenced or the materials were furnished.

Mechanics' Liens—Necessity of Foreclosure.

2. A mechanic's lien must be foreclosed by suit in which a decree is rendered as in other suits.

Mechanics' Liens—Decree—Effect.

3. Decree of foreclosure of mechanic's lien is not different from others as to its effect upon property, and as there are no exceptions in the homestead laws in favor of such decree, it affects them in the same manner as other judgments or decrees.

[As to divestiture of judgment lien by subsequent occupation of land of or homestead purposes, see note in Ann. Cas. 1913B, 1147.]

Homestead—Claim of Homestead.

4. Section 221, L. O. L., providing that the homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained, does not impair a mechanic's lien upon the homestead premises, but merely suspends its execution if the owner of the homestead claims the exemption.

Mandamus—Judicial Acts—Preservation of Homestead.

5. Plaintiffs sued to foreclose a mechanic's lien. They secured decree, and execution was placed in the hands of the sheriff. The owner sued to enjoin the sheriff from selling the property on the ground that it was her homestead which she had claimed by due notice under Section 224, L. O. L. Injunction was granted. Plaintiffs then applied for *mandamus* to compel revocation of the injunction and levy of the execution. *Held*, that as the judges had authority judicially to hear and determine the suit instituted to preserve the homestead, and as under Section 613, L. O. L., *mandamus* does not control judicial discretion, the writ could not be granted.

Mandamus—Function of Writ.

6. In such case, *held* that *mandamus* could not issue against the sheriff to compel the execution, since if he wrongfully refused to levy it, plaintiffs had a remedy upon their bond.

Original proceeding in Supreme Court.

In Banc. Statement by MR. JUSTICE BURNETT.

The plaintiffs here instituted a previous suit in the Circuit Court of Multnomah County against Josephine Paulson to foreclose mechanics' liens which they claimed for labor and material furnished and which were used in the construction of a dwelling-house for her. From a decree in that suit in favor of the plaintiffs the defendants appealed, but the decision of the Circuit Court was affirmed after slight modifications and a mandate of this court was issued and directed to that court substantially requiring it to enter a decree in accordance with the opinion rendered, order a sale of the property, and in case such sale should fail to pay all the amounts mentioned in the decree, together with interest, cost of sale, and the costs and disbursements of the court below, it should enter judgment against the defendants in that case and their surety for such deficiency. In this original proceeding here for a writ of *mandamus* that document discloses the history of the proceedings up to the point indicated, and further states in substance that the Circuit Court entered the mandate as required; that an execution was issued thereon and placed in the hands of the present defendant Hurlburt, who is sheriff of Multnomah County; that he offered the property for sale after due notice thereof and struck it off to the husband of Josephine Paulson, he being the highest bidder for the property, but that, he having refused to pay his bid, another execution was issued on the decree. At this juncture Josephine Paulson commenced a suit in equity against the sheriff to enjoin him from attempting to sell the property on the ground that at the time of the issuance of the execution and his attempt to sell, she was residing on the property in the

house in question and by due notice to the sheriff, claimed it as her homestead and that of her family. That suit was heard in the Circuit Court before the defendant Tucker as one of the judges thereof, and a decree was entered therein according to the prayer of the bill restraining the sheriff from selling the property on the grounds that it was a homestead as alleged. The alternative writ of *mandamus* issued out of this court recites the history of the affair substantially as indicated, but more in detail, requires the two defendants who are circuit judges to revoke the decree of injunction and allow the sheriff to proceed with the sale and commands the latter officer to sell the realty as directed by his writ. All the defendants were given the option of adducing any valid reason why they have not obeyed the present writ of *mandamus*. Called upon to show cause why it should not be made peremptory the defendants have demurred generally.

DEMURRER SUSTAINED.

For plaintiffs there was a brief over the names of *Messrs. Hall & Lepper, Messrs. Asher & Johnstone, Messrs. Lewis & Lewis* and *Messrs. Angell & Fisher*, with oral arguments by *Mr. Arthur H. Lewis* and *Mr. H. D. Angell.*

For defendants there was a brief and an oral argument by *Mr. L. P. Hewitt.*

MR. JUSTICE BURNETT delivered the opinion of the court.

"The homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained. Such homestead must be the actual abode of, and owned by such family, or some member thereof": Section 221, L. O. L.

"When any officer shall levy upon such homestead, the owner thereof, wife, husband, agent or attorney of such owner, may notify such officer that he claims such premises as his homestead * * ": Section 224, L. O. L.

1–4. Although a mechanic's lien takes its origin with the furnishing of labor or materials it is not perfected until the notice or claim of lien is filed, whereupon it relates back to the beginning when the work commenced or the materials were furnished. It is still necessary to foreclose such a lien by suit in which a decree is rendered as in other suits for such purposes. The decree thus rendered is not different from others in its effect upon the property and there being no exceptions in the homestead laws in favor of such determination it affects them in the same manner as in other judgments or decrees. The operation of the statute under consideration is not to impair the lien, but only to suspend its execution and then only at the claim of the owner of the homestead. This is the doctrine of *Hansen* v. *Jones,* 57 Or. 416 (109 Pac. 868). It is taught also in *Davis* v. *Low,* 66 Or. 599 (135 Pac. 314), that an execution upon a judgment for labor or material improvements upon the homestead are within the class from which the homestead is exempt. The statute creating this exemption, after defining the right, gives to the owner of the homestead the privilege of claiming the same at least as late as the levy of the execution. In any event he is not required to make the claim until after decree. It is a means of resistance against the execution. In a sense it is a post judgment privilege and it is not required that the same shall be asserted as a defense against the cause of suit or action which ripens into a judgment or decree.

It is true that it was said *arguendo* in *Davis* v. *Low*, 66 Or. 599 (135 Pac. 314):

"It would probably be too late for a debtor to claim the homestead exempt from levy and sale on execution after the court has declared the debt to be a lien upon the property and decreed a sale thereof."

This excerpt, not necessary to the decision in that case, is controlled by the reasoning in the previous holding in *Hansen* v. *Jones*, 57 Or. 416 (109 Pac. 868), as well as by the opinion in *Wilson* v. *Peterson*, 68 Or. 525 (136 Pac. 1187), where Mr. Justice BEAN, applying the rule of liberal construction to the statute granting the exemption in question, decides that it may be claimed at any time before sale of the property. The deduction is that a decree foreclosing a mechanic's lien may be a charge upon a homestead in like manner and with like effect as upon other realty subject to having its execution suspended by the claim of the owner of the land and to remain thus in abeyance as long as it continues to be a homestead as defined by the enactment.

5. The courts are, as of right, open to protect the homestead right whenever it lawfully shall be exercised, and the judges had authority judicially to hear and determine the suit instituted to preserve it. It is laid down in Section 613, L. O. L., that *mandamus* does not control judicial discretion. The judicial officers in question had jurisdiction to determine the questions presented in the suit for injunction and whether they decided that question rightfully or wrongfully it matters not in this case. To determine in this proceeding the correctness of their decision, having the parties and subject matter before them by appropriate process, would be to make the writ of *mandamus* perform

the office of an appeal, a conclusion not to be entertained. The demurrer to the writ is therefore sustained as to the defendants Tucker and Kavanaugh, who are judges of the Circuit Court.

6. The same conclusion must be reached respecting the defendant Hurlburt, the sheriff, but upon different grounds. In *Habersham* v. *Sears,* 11 Or. 431 (50 Am. Rep. 481, 5 Pac. 208), the defendant sheriff had refused to levy an execution in his hands in favor of the plaintiff although the debtor in the writ had ample property which was pointed out to the officer. The plaintiff sought by a *mandamus* to compel him to levy and sell, but in an opinion by Mr. Justice LORD, this court held that the writ would not lie, there being a remedy upon the sheriff's bond. It is urged, however, that this precedent does not apply in the present juncture because the sheriff has been enjoined from proceeding with the sale. We note, however, that he has process in his hands in favor of the plaintiffs commanding him to make the money on their decree. As between himself and them in order to avoid the discharge of his duty as required, or to escape liability upon his bond he must show that some obstacle binding upon them was interposed to prevent his executing the writ. They were not parties to the suit to enjoin him at the instance of Josephine Paulson, hence the decree would not conclude them nor affect them in any manner. The sheriff had an opportunity to make them defendants in that suit or to call upon them to defend the same. Having done neither of those things if he were summoned to defend their action upon his official undertaking he would necessarily have to assume the burden of showing the ultimate fact that the property in question was the homestead of Jose-

phine Paulson and that she claimed the same at the proper time as exempt from execution. The decree between the sheriff and Josephine Paulson alone cannot affect strangers to that adjudication. The allegations of the writ do not exclude the possibility of a remedy at law adequate and sufficient by an action upon the sheriff's bond and hence under the authority of *Habersham* v. *Sears,* 11 Or. 431 (50 Am. Rep. 481, 5 Pac. 208), the demurrer to the writ must be sustained as to him. Demurrer Sustained.

Submitted on briefs September 14, reversed and remanded October 3, 1917.

McKERN *v.* THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE.

(167 Pac. 795.)

Insurance—Action on Policy—Sufficiency of Evidence.

1. Before plaintiffs are entitled to judgment on a policy they have to show the amount of loss sustained.

Insurance—Marine Insurance—Cause of Loss.

2. Under a policy insuring against the perils of the waters, it was incumbent on plaintiffs to show that the sinking of the boat was caused by the perils insured against.

Insurance—Marine Insurance—Presumption and Burden of Proof.

3. If there is evidence showing that a vessel was lost or damaged on encountering some peril insured against, the presumption is that the vessel was seaworthy, and the burden rests upon the insurer to show the contrary.

Insurance—Marine Insurance—Presumption and Burden of Proof.

4. When a loss occurs which cannot be ascribed to stress of weather, or to any accident which might possibly have produced it, the presumption is that the vessel was defective and not seaworthy, and the burden of proving otherwise is on the insured.

[As to what is within the law of seaworthiness in marine insurance, see note in 33 **Am. Dec.** 33.]

From Multnomah: William N. Gatens, Judge.

Action by E. L. McKern and M. S. Hughes against The Corporation of the Royal Exchange Assurance (of London) to recover on a policy of insurance the damages resulting from the sinking of plaintiff's motor boat in the waters of the Willamette River. From a judgment in favor of plaintiffs, defendant appeals. Submitted on briefs under the proviso of Supreme Court Rule 18: 56 Or. 622 (117 Pac. xi). Reversed and remanded.

In Banc. Statement by Mr. Justice Harris.

This is an action on an insurance policy. The plaintiffs owned a motor boat upon which the defendant had issued a policy insuring

"while in port and at sea * * at all times and in all places upon the Columbia River and its tributaries, the tackle, apparel, materials, fittings, furniture, electric light installation, and all machinery and boilers, * * against the perils of the waters."

The complaint alleges that while the boat was in port upon the waters of the Willamette River, a tributary of the Columbia River, it "sank and became submerged in the waters of the Willamette River," and damaged the injured property to the extent of $254.75.

The answer denies the allegation of damage and alleges that "at the time of the injury" the hull of the boat

"was rotten and in an unseaworthy condition, and that the plaintiffs well knew said fact, and that they carelessly and negligently tied said boat while in said condition in a boat house at Portland in such a manner that the said boat sunk and caused the injury complained of, and that the sinking of the said boat and the injury complained of was due solely to the unseaworthy condition of said boat and the fact that

the hull was rotten, as aforesaid, and to the fact that the plaintiffs, while said boat was in said condition, carelessly and negligently tied said boat in a boat house in such a manner that the same would sink on account of its own unseaworthiness and said rotten hull, and under said policy, the defendant did not insure said boat, or anything thereon above enumerated, against the loss, injury or damage occasioned or resulting in the manner or for the causes which damaged said boat and its equipment."

The answer also contains averments to the effect that by the express terms of the policy the defendant was exempt from liability for

"loss of or damage to hull or machinery through the negligence of master, mariners, engineers or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the yacht, or any of them, or by the manager; but free from any claim for the part in which latent defect existed."

The reply denied that the boat was unseaworthy or that the plaintiff carelessly tied the boat in a boat house or that the policy contained the exemption provision pleaded by the defendant.

The action was commenced in the District Court for Multnomah County and a trial resulted in a judgment for the plaintiff. The defendant then appealed to the Circuit Court. When the cause was called for trial in the Circuit Court the plaintiffs contended that the burden of proving unseaworthiness rested upon the defendant while the latter insisted that the burden was upon the plaintiffs to show that the boat was seaworthy. The court ruled that it was incumbent upon the insurer to prove unseaworthiness, and thereupon the defendant announced that it would not offer

any evidence; and then without offering any evidence to sustain any of the allegations of the complaint the plaintiffs moved for a judgment "confirming the judgment of the lower court," while the defendant "moved the court for an order of nonsuit on the ground that plaintiffs have failed to produce any testimony." The motion for a judgment of nonsuit was denied; the motion of the plaintiffs was allowed and the court granted a judgment against the defendant for $254.75. The defendant appealed.

Reversed and Remanded.

For appellant there was a brief over the name of *Messrs. Fulton & Bowerman.*

For respondents there was a brief over the name of *Mr. Morris A. Goldstein.*

Mr. Justice Harris delivered the opinion of the court.

1. The pleadings presented two issues: One concerned the liability of the defendant, and the other related to the amount of the loss sustained by the plaintiffs. To determine that the insurer is liable is only to take one of the two steps required to be taken before the plaintiffs are entitled to a judgment, for the insured have yet to show the amount of the loss sustained by them; and, hence, the judgment cannot be sustained. No evidence was offered upon any subject and consequently there was no evidence to warrant a judgment for $254.75, even though it be assumed that the defendant is liable: 26 Cyc. 726.

2–4. The pleadings admit that the boat sank while in port, but there is not a word of evidence to show the cause of the sinking. If the loss did not occur from

some cause insured against, the plaintiffs cannot recover; and it was therefore incumbent upon the plaintiffs to show that the sinking was probably caused by one of the perils insured against: *Cory* v. *Boylston F. & M. Ins. Co.,* 107 Mass. 140 (9 Am. Rep. 14); *Soelberg* v. *Western Assur. Co.,* 119 Fed. 23 (55 C. C. A. 601); 26 Cyc. 723, 730. If there is evidence showing that a vessel was lost or damaged upon encountering some peril insured against, the presumption is that the vessel was seaworthy and the burden rests upon the insurer to show that the vessel was unseaworthy; but when a loss occurs which cannot be ascribed to stress of weather, or to any accident which might by possibility have produced it, the fair and natural presumption is that the vessel was defective and not seaworthy, and the burden of proving that, in fact, she was seaworthy is then thrown on the insured: *Higgie* v. *American Lloyds,* 14 Fed. 143, 147 (11 Biss. 395); *Parker* v. *Union Ins. Co.,* 15 La. Ann. 688; *Dupeyre* v. *Western M. & F. Ins. Co.,* 2 Rob. (La.) 457 (38 Am. Dec.) 218; *Deshon* v. *Merchants' Ins. Co.,* 52 Mass. (11 Met.) 199; *Barnewall* v. *Church,* 1 Caines (N. Y.), 217 (2 Am. Dec. 180); *Snethen* v. *Memphis Ins. Co.,* 3 La. Ann. 474 (48 Am. Dec. 462); *Treat* v. *Union Ins. Co.,* 56 Me. 231 (96 Am. Dec. 447); *Perry* v. *Cobb,* 88 Me. 435 (34 Atl. 278, 49 L. R. A. 389); *Miller* v. *South Carolina Ins. Co.,* 2 McCord (S. C.), 336 (13 Am. Dec. 734); *Rugely* v. *Sun Mut. Ins. Co.,* 7 La. Ann. 279 (56 Am. Dec. 603); *Martin* v. *Fishing Ins. Co.,* 20 Pick. (37 Mass.) 389 (32 Am. Dec. 220); *Wallace* v. *De Pau,* 1 Brev. (S. C.) 252 (2 Am. Dec. 662); *Talcot* v. *Commercial Ins. Co.,* 2 Johns. (N. Y.) 124 (3 Am. Dec. 406); *The Orient,* 16 Fed. 916 (4 Woods, 255); *Swift* v. *Union Mut. Marine Ins.*

Co., 122 Mass. 573; 26 Cyc. 723; 7 Enc. of Ev. 549; 14 R. C. L., p. 1046, § 223. The plaintiffs did not make a sufficient record to support the judgment. The judgment is reversed and the cause is remanded for further proceedings. REVERSED AND REMANDED.

Argued September 20, affirmed October 3, 1917.

JOHNSON *v.* JELDNESS.

(167 Pac. 798.)

Navigable Waters—Tide-lands—Grants—Effect.

1. The title of the owner of tide-lands, coming to him from the state, is impressed with the *jus publicum*, or public ownership, which was retained by the state, and which includes the public rights of navigation and fishery.

Navigable Waters—Littoral Rights—Fish-traps.

2. The owner of tide-lands, on a navigable stream, cannot be deprived of his rights to draw seines along his lands by erection of fish-traps by private individuals under federal license, on the theory that such persons are acting under the *jus publicum*, since they act in their own interests, and cannot invoke the rights of the public.

Nuisance—Public Rights—Special Damage.

3. The owner of tide-lands on a navigable stream suffers such special damage by invasion of his right of access to his property that he has a sufficient standing in a court of equity to enjoin encroachment, since his right of access attaches equally to every part of his shore line.

[As to nature of riparian rights and lands to which they attach, see note in Ann. Cas. 1913E, 709.]

Navigable Waters—Littoral Rights—Fish-traps.

4. Act Cong. Feb. 14, 1859, Chapter 33, Section 2, 11 Stat. 383, providing that the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state and other states, and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, merely declares and preserves the *jus publicum*, including the public rights of navigation and fishery; but a free-

holder whose close abuts upon such waters is entitled to the aid of the courts to maintain his right against invasion by private persons in his own interest.

From Clatsop: JAMES A. EAKIN, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff, a citizen and resident of the State of Oregon, is the admitted owner of a certain upland island and the tide-lands in front of the same in the navigable waters of the Columbia River. The place is valuable to him for fishing purposes, not only as a member of the general public, but also for the fact that he, as proprietor of the uplands, has the exclusive appurtenant right to draw his seines ashore on his own premises. He complains that the defendants have made preparations for and are in the act of constructing a pound net in front of his land and for that purpose have driven a row of piling at right angles to the shore 10 or 15 feet apart and 300 or 400 feet in length upon which to construct the fishing apparatus described.

The defendants avow the driving of the piles and claim to be acting under licenses from the United States War Department and from the Master Fish Warden of the State of Oregon. They say that their structure is entirely in the open, unappropriated, and unoccupied navigable waters of the Columbia River at least 150 feet below low-water mark of the plaintiff's tide-lands, and that between there and the plaintiff's land the waters are at all times navigable.

The answer is challenged by the reply. From a decree perpetually enjoining the defendants from driving any piling or other permanent structure in front of plaintiff's premises, the defendants have appealed.

AFFIRMED.

For appellants there was a brief over the names of *Mr. Bert Henry* and *Messrs. Anderson & Erickson,* with an oral argument by *Mr. Henry.*

For respondent there was a brief over the names of *Mr. George C. Fulton* and *Mr. A. C. Fulton,* with an oral argument by *Mr. George C. Fulton.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1–3. Quoting from their brief, the defendants contend that

"the title to plaintiff's tide-land came to him from the state, impressed with the *jus publicum* or public ownership, which was retained by the state, and which includes the public rights of navigation and fishery."

This is very true as a major premise: *Bowlby* v. *Shively,* 22 Or. 410 (30 Pac. 154); *Hume* v. *Rogue River Packing Co.,* 51 Or. 237 (83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 131 Am. St. Rep. 732, 31 L. R. A. (N. S.) 396); *Corvallis & Eastern R. Co.* v. *Benson,* 61 Or. 359 (121 Pac. 418). The fallacy of their argument is the assumption that they are operating in the right of the public, when in truth they are operating for their private interests to the exclusion of all other members of the public. In so doing they interfere materially with the plaintiff's right of access to his land. The defendants cannot act under the sanction of the *jus publicum* or common right so as to exclude any other member of the public from the general privilege of fishing and navigation in the navigable waters under consideration. To allow them to drive rows of piles in front of the plaintiff's lands would be seriously to impair his right as a member of the public to seine

for fish there, and this, being coupled with his exclusive right to draw his seine upon the shores of his premises with which the fixed apparatus of the defendants would interfere, he has a right to resist their encroachment and to secure a permanent injunction against the same as for a continued trespass. In this invasion of his right of access to his property for all lawful purposes to which it may be devoted he suffers an injury not experienced by the public generally and so has standing in court to secure its prevention. If the property of the plaintiff or its appurtenances could lawfully be parceled out among other individuals without his consent or if, assuming to act under the common right of fishery, the defendants could exclude others from that privilege, their acts in question might be justified; otherwise not. The plaintiff's right of access attaches equally to the whole and every part of his shore line. The defendants have no right to fetter or impair his enjoyment of his property by compelling him to go upon it only at certain points. To allow them to maintain piling or other fixed appliances of the kind in front of his premises would be to establish a monopoly to that extent in their favor and to his special detriment. It would permit them to say to him: "You may fish where you can or how you can, so far as we have left you opportunity, and you may take your fish ashore on your premises at places only which we have left open." The defendants cannot lawfully subvert the exercise of the common right of fishery to their exclusive personal benefit, especially where it works peculiar harm to the plaintiff in the beneficial use of his holdings.

4. Section 2 of the act of Congress, approved February 14, 1859, admitting the State of Oregon into the Union, reads thus:

"The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state, and other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor."

This section is declarative and preservative of the *jus publicum* including the public right of navigation and fishery. The plaintiff is a freeholder whose close abuts upon this highway and resting upon his private right of access thereto he is entitled to the aid of the courts to maintain the freedom of it against invasion by private persons in their own interest: *Sandstrom* v. *Oregon, Wash. R. & Nav. Co.,* 75 Or. 159 (146 Pac. 803). It is not a case of taking his property or its appurtenances for public use by the right of eminent domain as in spanning a navigable stream by a public bridge, extending harbor lines, and the like. It is an instance of an attempt to take private property for the use and benefit of other individuals in whom the sanction of eminent domain is not vested. Except that the plaintiff suffers peculiar injury not experienced by the people in general, the threatened encroachment of the defendants upon the freedom of navigation and fishery, designed to create a monopoly for themselves, would normally fall within the federal enactments for the protection of the use of public waters and his suit could not be entertained in the state courts. Inasmuch, however, as his private right is violated by private persons in their own interest the judicial power of the state will grant appropriate relief.

The principles applicable to the instant case are so thoroughly expounded by Mr. Justice MOORE in *Eagle Cliff Fishing Co.* v. *McGowan,* 70 Or. 1 (137 Pac. 766), and by Mr. Justice HARRIS in *Monroe* v. *Withycombe,* 84 Or. 328 (165 Pac. 227), that further comment is unnecessary. The decree of the Circuit Court is affirmed. AFFIRMED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Argued July 5, reversed and remanded July 24, rehearing denied October 9, 1917.

SWANK *v.* MOISAN.

(166 Pac. 962.)

Pleading—Election Between Defenses—Powers of Court.

1. The Circuit Court has power to require an election between affirmative defenses, provided the application of plaintiff is made seasonably, and the action of the court is based on some good reason shown by the record.

Sales—Invalid Contracts—Warranties—Validity.

2. If a contract of sale of an automobile was invalid, warranties of the machine made by the seller are also invalid.

Pleading—Inconsistent Defenses—Election—Powers of Court.

3. Since answers are not inconsistent so long as they may both be true, an answer in an action on a note, alleging as agreement for exchange of automobiles, the note being given to cover the difference, and setting up certain warranties which were broken, is not so inconsistent with a second answer alleging invalidity of the sale by reason of failure to comply with Laws of 1911, page 265, Section 3, as to registering ownership that an election of answers should have been required.

Appeal and Error—Harmless Error—Requiring Election Between Defenses.

4. Where the court erroneously required defendant to elect between two defenses and he chose the first, the judgment should be

affirmed, notwithstanding the error, if the second answer was insufficient.

Sales—Automobiles—Registration of Title.

5. Laws of 1911, page 265, Section 3, requiring the vendor of an automobile within five days after the sale to report to the Secretary of State the name and address of the vendee, or providing that the vendee may, within ten days, have the license number transferred to himself, and providing that no sale or transfer shall be valid without compliance with the statute, a sale without compliance is not invalid *ab initio*, but the statute merely attaches a contingent condition subsequent on which the sale may become abortive.

Sales—Validity.

6. There is a vital distinction between a contract void *ab initio* and a contract merely voidable.

Sales—Invalidity—Rights of Parties.

7. Where a sale of an automobile was invalid for failure to comply with Laws of 1911, page 265, Section 3, the vendor could replevy the automobile and recover the value of its use, though he could not recover on a note given to evidence the purchase price.

Sales—Action for Price—Defenses.

8. In action on note given on exchange of automobiles, where answer set up defense of breach of warranty and of failure to comply with Laws of 1911, page 265, Section 3, as to registration of title, since the plaintiff could not recover on the note if the sale was invalid, the second answer set up a substantial defense, and it was error to require an election.

From Marion: PERCY R. KELLY, Judge.

Action by Sherm Swank against Mart T. Moisan and J. M. Moisan in which plaintiff recovered judgment and defendants appeal. Reversed and remanded.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is an action on a promissory note for $750 given by the defendants to plaintiff October 5, 1912. The complaint is in the usual form. The answer denies the allegations of the complaint "except as hereinafter alleged." A first affirmative answer alleges an agreement between the parties for the exchange of a runabout owned by defendants for a touring car

owned by plaintiff and the execution of the note in question to cover the difference in the value of the two vehicles. The defendants allege certain warranties of the touring car which were broken to their damage in a sum equal to the face of the note given plaintiff.

A second affirmative answer alleges that the note was given to make up the difference in the value of the automobiles exchanged and then sets up the following allegations:

"That for some time prior to the 5th day of October, 1912, the plaintiff had duly registered with the Secretary of State of Oregon his said Maxwell touring car as is provided by section 3 of chapter 174 of the Session Laws for the year 1911, but the plaintiff failed upon making said sale and exchange with defendants as aforesaid and when transferring and delivering said Maxwell touring car to defendants, within five days after the date of said sale and exchange or at any time thereafter, to notify the Secretary of State of such sale on giving said Secretary of State the name of the purchaser, and the number under which said automobile was registered, or did said defendants within five days after making said sale and exchange, or any time thereafter make application to the Secretary of State of Oregon to have the license or registration number transferred to them as is provided by section 8 of said chapter 174 of the Session Laws for the year 1911, and by reason of the premises the aforesaid sale and transfer is illegal and void."

The statute referred to in the answer is the motor vehicle act of 1911. It makes provision for the operation and registration of motor vehicles. Section 8, which is material here, is as follows:

"Upon the sale of a vehicle registered in accordance with this act the vendor shall, within five days after the date of such sale, notify the Secretary of State, stating the name and business address of the purchaser and the number under which such vehicle is registered;

provided, that the vendor may, upon application at the time of such notice, have the registration number transferred to a vehicle described in such application and owned by him, and which is not licensed under the law; or if any application be not received by the Secretary of State for a transfer of the license number by the vendor, as above provided, the vendee, upon filing application after five days and within ten days after the date of sale, may have the license or registration number transferred to him. A fee of one dollar shall be paid to the Secretary of State for each transfer, all applications for which he shall file in his office and note upon the registration book or index such change, and at least monthly notify every county clerk of the State of such transfers, each of whom shall immediately note the same on the list of registered vehicles and kept on file as herein provided. No sale or transfer of any vehicle shall be valid without compliance with this section."

On plaintiff's application the court required defendants to elect on which of the two affirmative answers they would defend, holding in effect that these answers are inconsistent and contradictory.

Defendants elected to try the case on their first affirmative answer. Plaintiff replied, admitting that the note was given in connection with the exchange of the automobiles, to cover the difference in their value, and denying the other affirmative allegations of the answer.

The jury found for plaintiff; from a judgment in his favor defendants appeal. REVERSED AND REMANDED.

For appellants there was a brief and an oral argument by *Mr. William P. Lord.*

For respondent there was a brief and an oral argument by *Mr. Walter C. Winslow.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

1. This appeal raises only one question of law: Did the Circuit Court err in requiring defendants to elect on which of their affirmative defenses they would stand? The power of the Circuit Court to require such election in a proper case is well established, *Harvey* v. *Southern Pacific,* 46 Or. 505, 512 (80 Pac. 1061), provided that the application of the adverse party is made seasonably: *Rosenwald* v. *Oregon City Transp. Co.,* 84 Or. 15 (163 Pac. 831, 833). The action of the court in requiring an election must be based on some good reason shown by the record: *Susznik* v. *Alger Logging Co.,* 76 Or. 189, 195 (147 Pac. 922).

2, 3. The only ground for requiring an election which is relied on in this case is that the two defenses are "inconsistent and legally contradictory." If the contract of sale is invalid as contended in the second affirmative answer, the warranties which defendants set up in their first affirmative answer are also invalid: 2 Mechem on Sales, § 1056; *Howard* v. *Harris,* 8 Allen (90 Mass.), 297; *Gunderson* v. *Richardson,* 56 Iowa, 56 (8 N. E. 686, 41 Am. Rep. 81); *Finley* v. *Quirk,* 9 Minn. 194 (86 Am. Dec. 93, 95). The legal contentions of defendants are therefore not harmonious, but this is not sufficient to charge these answers with inconsistency; *Snodgrass* v. *Andross,* 19 Or. 236, 239 (23 Pac. 969). Under the Oregon decisions answers are not inconsistent so long as they may both be true; *McDonald* v. *American Mortgage Co.,* 17 Or. 626, 633 (21 Pac. 883); *Snodgrass* v. *Andross,* 19 Or. 236, 239 (23 Pac. 969); *Veasey* v. *Humphreys,* 27 Or. 515, 520 (41 Pac. 8); *Randall* v. *Simmons,* 40 Or. 554, 559 (67 Pac. 513); *Dutro* v. *Ladd,* 50 Or. 120, 122 (91 Pac. 459); *Susznik* v. *Alger Logging Co.,* 76 Or. 189, 195

(147 Pac. 922). Tested by this rule the affirmative answers are not inconsistent and the Circuit Court should not have required defendants to elect as between them.

4–8. Notwithstanding this error the judgment should be affirmed if the second affirmative answer is insufficient. The sufficiency of this answer is dependent on the construction to be given Section 8 of the motor vehicle law of 1911, quoted above. The purpose of legislation requiring the registration of automobiles is defined in Huddy on Automobiles (3 ed.), Section 59:

"The reason assigned for the necessity of registration and licensing is that the vehicle should be readily identified in order to debar operators from violating the law and the rights of others, and to enforce the laws regulating the speed, and to hold the operator responsible in cases of accident. The legislatures have deemed that the best method of identification, both as to the vehicle and the owner or operator, is by a number on a tag conspicuously attached to the vehicle. In case of any violation of law this furnishes means of identification, for, from the number, the name of the owner may be readily ascertained and through him the operator."

With the above purposes in view the legislature has provided that unless a motor vehicle is registered with the Secretary of State within ten days after its sale, such sale is invalid. The act does not make the sale invalid *ab initio*. The contract of these parties was valid when made. The effect of the statute is to attach to every sale of a motor vehicle a contingent condition subsequent under which the sale may become abortive on failure to comply with the statutory requirements with reference to registration. The contract with which we are concerned was not immoral and it violated no statute when it was made. Does the

invalidity of the sale arising ten days later through the operation of the statute preclude the enforcement by the vendor of a note given for the purchase price?

There is a vital distinction between a contract void *ab initio* and a contract merely voidable: *Bradtfeldt* v. *Cooke,* 27 Or. 194, 201 (40 Pac. 1, 50 Am. St. Rep. 701). The contract was ineffectual rather than illegal and the case therefore falls without the rule announced in *Ah Doon* v. *Smith,* 25 Or. 89 (34 Pac. 1093); *Pacific Livestock Co.* v. *Gentry,* 38 Or. 275, 290 (61 Pac. 422, 65 Pac. 597); *Cullison* v. *Downing,* 42 Or. 377, 383 (71 Pac. 70); *Jackson* v. *Baker,* 48 Or. 155, 157 (85 Pac. 512).

We have found no case construing such a statute as that with which we are concerned, but under analogous statutes regulating sales the rule seems to be that the vendor cannot recover the purchase price of property sold in a manner which the statute inhibits. The cases make no distinction between actions based on the contract of sale and those based on notes or checks given for the purchase price.

It is held that a merchant whose weights have not been sealed as required by statute cannot recover the purchase price of goods sold by these weights: *Smith* v. *Arnold,* 106 Mass. 269, 271; *Sawyer* v. *Smith,* 109 Mass. 220; *Bisbee* v. *McAllen,* 39 Minn. 143, 144, 145 (39 N. W. 299). Where a statute requires an official survey of lumber by a sworn surveyor, a merchant cannot recover the purchase price of lumber sold without such survey: *Richmond* v. *Foss,* 77 Me. 590 (1 Atl. 830); *Prescott* v. *Battersby,* 119 Mass. 285, 287.

A Massachusetts statute required "oats and meal to be bargained for and sold by the bushel." A seller who sold by the bag was denied the right to recover the purchase price: *Eaton* v. *Kegan,* 114 Mass. 433,

434, 435. Several of the states have enacted statutes requiring an official analysis of commercial fertilizers and the marking of their containers in a certain manner. It is held that no action will lie for the enforcement of promissory notes given for the purchase price of fertilizers sold in violation of these regulations: *Campbell* v. *Segars,* 81 Ala. 259 (1 South. 714); *Pacific Guano Co.* v. *Mullen,* 66 Ala. 582, 589; *Johnston* v. *McConnell,* 65 Ga. 129, 130–132; *Conley* v. *Sims,* 71 Ga. 161, 162, 163; *Allen* v. *Pearce,* 84 Ga. 606 (10 S. E. 1015); *Vanmeter* v. *Spurrier,* 94 Ky. 22, 28–31 (21 S. W. 337); *McConnell* v. *Kitchens,* 20 S. C. 430, 439, 440 (47 Am. Rep. 845).

The sale of plaintiff's automobile became invalid ten days after the date of sale by operation of this statute. There being nothing immoral or unlawful in the contract of the parties, the law will not leave them where it finds them. Plaintiff could replevy his automobile and recover the value of its use by the defendants: *Keller* v. *Bley,* 15 Or. 429, 433 (15 Pac. 705); *Bowman* v. *Wade,* 54 Or. 347, 352 (103 Pac. 72); *Kidder* v. *Hunt,* 1 Pick. (18 Mass.) 328, 331, 332 (11 Am. Dec. 183); *Basford* v. *Pearson,* 9 Allen (91 Mass.), 387, 391 (85 Am. Dec. 764); *Williams* v. *Bemis,* 108 Mass. 91, 92, 93 (11 Am. Rep. 318); *White* v. *Wieland,* 109 Mass. 291, 292; *Root* v. *Burt,* 118 Mass. 521, 523; *Parker* v. *Tainter,* 123 Mass. 185, 187; *Lockwood* v. *Barnes,* 3 Hill (N. Y.), 128, 131, 132 (38 Am. Dec. 620); *Gillett* v. *Maynard,* 5 Johns. 85 (4 Am. Dec. 329); *Smith* v. *Smith,* 28 N. J. L. 208, 217 (78 Am. Dec. 49). But plaintiff cannot recover on a note given to evidence the purchase price on a sale which is invalid. The second affirmative answer stated facts sufficient to constitute a defense and the error in requiring an election

was substantial. The judgment is reversed and the cause remanded. REVERSED AND REMANDED.
REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE MOORE and MR. JUSTICE BEAN concur.

Argued July 20, affirmed September 19, rehearing denied October 9, 1917.

CITY OF CLATSKANIE *v.* MCDONALD.

(167 Pac. 560.)

Easements—Sidewalk—Establishment by User.

1. Where the use of a sidewalk was permissive in its origin, it could not become adverse without some unequivocal assertion of the rights of the public inconsistent with the title of the record owner.

[As to presumption of dedication from user of highway, see note in Ann. Cas. 1914D, 335.]

Dedication—Dedication in Pais—Proof.

2. Dedication by acts *in pais* will not be assumed, without clear evidence manifesting an unmistakable intention to abandon to the public use.

Dedication—Dedication in Pais—Sufficiency of Evidence.

3. In a suit to determine an adverse claim to a strip of land in front of a hotel, evidence *held* not to show a dedication to the public as a part of the street.

Dedication—Evidence—Levy and Payment of Taxes.

4. Although the levy of taxes does not estop the public from claiming property as a highway, the continuous payment of taxes is evidence rebutting the presumption of a dedication.

Dedication—Sidewalk—Estoppel.

5. An owner, who built a hotel, back from the street with a sidewalk to the street line, with a roof over it, and induced other builders to conform to his building line, was not estopped from claiming title, in the absence of a showing that the other property owners constructed their buildings on the line because of their belief that they could use the sidewalk in front of the hotel.

Estoppel—Title to Land—Proof.

6. The title to real property cannot be divested by estoppel, without clear and satisfactory evidence.

From Columbia: JAMES A. EAKIN, Judge.

Suit by the City of Clatskanie, a municipal corporation, against J. W. McDonald and Charlotte M. McDonald, his wife, to quiet title. From a decree in favor of defendants, the city appealed. Affirmed.

Department 2. Statement by MR. JUSTICE MCCAMANT.

This is a suit brought by the City of Clatskanie, a municipal corporation, to determine an adverse claim asserted by defendants to certain property which plaintiff claims to be part of Bridge Street in said city. The only dispute relates to a strip of land forty-seven feet in length, its width varying from three and thirteen hundredths feet at the southeast to two and sixty-eight hundredths feet at the northeast. It is conceded that the record title to the property is in the defendants, but plaintiff claims title by prescription, parol dedication and estoppel. The decree of the lower court upheld defendants' contentions and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William H. Powell.*

For respondents there was a brief over the names of *Mr. G. A. Gore, Mr. M. E. Miller* and *Mr. W. A. Harris,* with an oral argument by *Mr. Gore.*

MR. JUSTICE MCCAMANT delivered the opinion of the court.

In 1885 a county road thirty feet in width was laid out on the site of what is now Bridge Street in Clatskanie. The land included in and abutting on this road was platted in April, 1902, but the road does not

appear on the plat. It is established by the testimony that the road extended fifteen feet on each side of the line dividing Lot 26 from Lot 27 in the subdivision. On June 7, 1912, the owners conveyed Lot 26 to the defendant J. W. McDonald and in the following month he commenced the construction of a building which has since been continuously used for hotel purposes. This defendant set the front of the building back twenty feet from some stakes which, as he supposed, marked the center line of the road. In front of the building he laid flooring five feet in width and roofed it over. The roof was supported by six wooden pillars which stood out five feet from the front of the building. A door and two windows on the second floor of the hotel opened out on this roof, which was on the same level as the second floor of the hotel. In 1908 the pillars were removed and thereafter the roof was supported by braces; at the same time this defendant extended the flooring or sidewalk in front of the hotel to a width of eight feet. Prior to this time some planks had been placed lengthwise the street in front of the defendants' property.

Defendants' hotel was the first building constructed on this part of the street, but in 1904 Barbara H. McKiel constructed a building about fifty feet northerly from that of defendants and the same year Ben Berkenfeld built on property which adjoined the defendants on the south. The front of the McKiel building was in line with the front of defendants' hotel. Berkenfeld had intended to extend his house five feet farther into the street than the defendants' property, but in consideration of some privileges granted to him by the defendants in the use of their hotel for twenty-five years he more nearly conformed to their building line; his building juts out two feet beyond the hotel.

Berkenfeld and McKiel laid sidewalks in front of their property. In 1905 the street was filled and graded and shortly thereafter the sidewalks on the street were connected up with planking. From the time when defendants' hotel was constructed in 1902 down to the bringing of this suit in October, 1915, the public has used the sidewalk in front of defendants' hotel more or less and it is admitted that subsequent to 1906 most of the foot travel on the street has passed over this sidewalk. For a short time the defendants boarded up the northerly end of the sidewalk on their property because of a hole in the dock on the adjoining property into which they feared someone might fall. When this hole was covered, the board was removed. The defendants have continuously paid taxes on the property in dispute.

1. In *Parrott* v. *Stewart,* 65 Or. 254, 260 (132 Pac. 523), Mr. Justice BEAN says:

"To establish a highway by prescription there must be an actual adverse public use, general, uninterrupted, continued for the period of the statute of limitations under a claim of right. * *

"A permissive use of a way by certain portions of the community constitutes a license and not a dedication, and is ordinarily something that may be revoked. * *

"Where the use is merely permissive, and not adverse, there is no basis on which a right of way by prescription may rest."

To the same effect see *Peters* v. *Robertson,* 73 Or. 263, 266 (144 Pac. 568). Plaintiff has failed to establish that the use of the premises by the public was hostile or adverse to the title asserted by defendants. The sidewalk was constructed originally for the use of defendants and those doing business at their hotel.

The use of the sidewalk was permissive in its origin and it could not become adverse without some unequivocal assertion of the rights of the public as inconsistent with the title on which defendants rely: 1 R. C. L. 704; 2 C. J. 124; *Bohrnstedt Co.* v. *Scharen,* 60 Or. 349, 354 (119 Pac. 337). The evidence tends to show that no such claim was asserted by plaintiff until 1915, shortly before the bringing of this suit.

2–4. Plaintiff contends that there has been a dedication of these premises by acts *in pais.* Such a dedication will not be assumed without clear evidence, manifesting an unmistakable intention on the part of the owner to abandon his property to the public use: *Hogue* v. *Albina,* 20 Or. 182, 187 (25 Pac. 386, 10 L. R. A. 673); *Lewis* v. *Portland,* 25 Or. 133, 155 (35 Pac. 256, 42 Am. St. Rep. 772, 22 L. R. A. 736); *Parrott* v. *Stewart,* 65 Or. 254, 259 (132 Pac. 523); *Harris* v. *St. Helens,* 72 Or. 377, 386 (143 Pac. 941, Ann. Cas. 1916D, 1073). Plaintiff's evidence fails to satisfy this requirement. The evidence shows circumstances indicating that defendants had no intention of abandoning their dominion over this property. For a short time they boarded it up and the evidence fails to show that anyone protested. They continuously paid the taxes. It is held that the levy of taxes on property does not estop the public from claiming it as a highway: *Campau* v. *Detroit,* 104 Mich. 560, 562 (62 N. W. 718); *San Leandro* v. *Le Breton,* 72 Cal. 170, 177 (13 Pac. 405); *Rhodes* v. *Brightwood,* 145 Ind. 21, 30 (43 N. E. 942); *Gillean* v. *City of Frost,* 25 Tex. Civ. App. 371, 377 (61 S. W. 345); *Johnson* v. *Knott,* 13 Or. 308, 315, 316 (10 Pac. 418). But the continuous payment of taxes is evidence rebutting the presumption of a dedication: 1 Elliott on Roads and Streets (3 ed.), 185; *Parrott* v. *Stewart,* 65 Or. 254, 260, 262 (132 Pac. 523); *Bauman*

v. *Boeckeler,* 119 Mo. 189, 199, 202 (24 S. W. 207); *Lockey* v. *Bozeman,* 42 Mont. 387 (113 Pac. 286, 290).

The maintenance by defendants of the roof over the sidewalk is some evidence that they continued to claim the property in dispute. The roof was also a porch used in connection with the second story of the hotel. These circumstances are each of slight evidentiary value, but taken in connection with the inadequacy of plaintiff's proof on the main issue, they satisfy us that there was no dedication.

5, 6. Plaintiff's final claim is that defendants are estopped to set up title to the property in question. In *Parrish* v. *Stephens,* 1 Or. 59, 69, it is said:

"He who induces the public to believe his land a gift, or knowingly permits them to use and treat it as their own, until they have so accustomed themselves, and adjusted their property and accommodated their business to it, that they cannot without detriment be dispossessed, confers a right which he can no more resume without wrong than he can rightfully seize what was acquired otherwise than by his gift."

Plaintiff contends that the defendants by constructing their hotel as above indicated and permitting the public to travel in front of it have induced other property owners to build on substantially the same line and that injustice would be done them if defendants were now permitted to claim as their own the property in dispute. On this issue the case is not free from doubt, but the burden of proof rests on plaintiff. The title to real property cannot be divested by estoppel without clear and satisfactory evidence: *Urquhart* v. *Belloni,* 57 Or. 314, 321, 322 (111 Pac. 692).

There is evidence that the defendant J. W. McDonald requested McKiel and Berkenfeld to conform to his building line in constructing their buildings, but there is no evidence that this defendant made any

representations with reference to the use of the sidewalk. Berkenfeld received a valuable consideration from McDonald for constructing on the line selected.

In order to sustain the estoppel contended for, the city should have proved that other property owners were induced to construct their buildings substantially in line with defendants' hotel by a belief induced by defendants that the strip of land in front of these buildings could be used as a sidewalk without claim thereto by defendants. The evidence fails to establish these facts. There is no evidence that other property owners constructed their buildings on the line selected because of their belief that they could use the sidewalk in front of defendants' hotel.

Plaintiff's claim of estoppel is predicated in part on the contribution by defendant J. W. McDonald of $40 to a fund to pay the expense of widening the street. The street was widened by moving back the houses on the opposite side from that with which we are concerned in this case. The defendants' part in the matter does not estop them from claiming title to the property in dispute.

The decree is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BEAN and MR. JUSTICE HARRIS concur.

MR. JUSTICE MOORE took no part in the consideration of this case.

Argued June 7, affirmed June 26, rehearing denied September 19, supplemental opinion filed October 16, 1917.

BENSON *v.* JOHNSON.*

(165 Pac. 1001; 167 Pac. 1014.)

Property—Evidence of Title—Presumption—Statute.

1. The legal probabilities regarding ownership of personal property established by Section 799, L. O. L., are not conclusive presumptions although they are sufficient to support a *prima facie* case.

Partnership—Assumed Name—Failure to Comply With Statute—Waiver of Defect.

2. The registration requirements of Laws of 1913, page 270, to be complied with by persons doing business under assumed names before bringing suit, will be waived by failure to object to bringing of the action by answer or demurrer; Section 68, L. O. L., providing that a demurrer lies when a pleading attacked shows on its face that plaintiff has not legal capacity to sue, and Section 71, providing that when such defects do not appear from the fact of the complaint the objection may be taken by answer, in view of Section 72, providing that if such objection be not taken by demurrer or answer it will be deemed to have been waived, excepting only objections to jurisdiction, and that complaint does not state facts sufficient to constitute a cause of action.

Fraudulent Conveyances—Necessity of Pleading—Bulk Sales Law.

3. The Bulk Sales Law (L. O. L. §§ 6069–6072), as amended by Laws of 1913, page 537, must be pleaded by the creditor who would avail himself of it, since it merely attaches to vendor's conduct a conclusive presumption that the transfer is fraudulent as to any and all creditors of vendor, and gives them a right which they may assert or ignore, and the law has the effect of creating a statutory fraud, necessary to be pleaded.

[As to construction of statutory provision that sale of goods in bulk shall be presumed to be fraudulent, see note in **Ann. Cas. 1913C, 1214.**]

Fraud—Presumption.

4. Fraud is never presumed, but must be pleaded and proved.

Fraudulent Conveyances—Bulk Sales Law—Effect.

5. Failure to comply with the Bulk Sales Law as amended does not affect validity of the transfer as between the parties, but only as against creditors.

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*On statutory requirements on sale of stock of goods in bulk, see note in 2 **L. R. A. (N. S.)** 331.

On effect of failure to allege and prove filing of claims by creditors and insufficiency of assets in action by trustee in bankruptcy to recover assets of estate or to set aside preference, or recover property fraudulently transferred by bankrupt, see note in 17 **L. R. A. (N. S.)** 350. REPORTER.

Witnesses—Cross-examination—Matter not Covered by Direct Examination—Bulk Sales Law.

6. Where a witness testified only to a sale between himself and plaintiff's bankrupt, he could not be cross-examined as to compliance with the Bulk Sales Law as amended, in view of Section 860, L. O. L., confining cross-examination to matters stated in direct examination, since noncompliance therewith did not affect the transfer as between the parties the "orthodox rule," extending cross-examination to every issue in the case, not being in force in this state; but such cross-examination could include all elements going to make up the transaction as between the parties, such as circumstances of sale, payment of consideration, time and place.

Fraudulent Conveyances—Pleading—Issues and Proof—Bulk Sales Law.

7. Where compliance with the Bulk Sales Law as amended was not pleaded, it could not be proved by cross-examination of the defendant.

Bankruptcy—Action by Trustee—Necessity of Pleading Preference.

8. A bankrupt's trustee, claiming that acts of bankrupt and another constituted a preference, must plead such preference.

SUPPLEMENTAL OPINION.

Trial—Instructions—Conformity to Issues.

9. An instruction embodying the provisions of Section 799, subdivision 40, L. O. L., that every sale of personal property capable of immediate delivery and every assignment thereof, unless accompanied by immediate delivery and followed by actual and continued change of possession, creates a presumption of fraud as against creditors or subsequent purchasers, was properly refused, where the issue of fraud was not raised by the pleadings.

From Douglas: GEORGE F. SKEPWORTH, Judge.

Department 1. Statement by MR. JUSTICE BURNETT.

The plaintiff as trustee in bankruptcy of C. F. Smith and Dee Howard, both as individuals and as partners under the firm name of "The Roseburg Garage," brought this action in replevin in the ordinary form to recover the possession of certain personal property said to have been owned by Smith prior to plaintiff's election as trustee.

The answer admits the official character of the plaintiff and his demands for the custody of the chattels, but otherwise denies the complaint. The defendant alleges that he himself is the owner of all the

effects in dispute with two minor exceptions which were laid out of the case by stipulation. He claims that the property was taken from him by virtue of the plaintiff's writ, and demands its restoration.

The allegation of the defendant's ownership is denied by the reply, which final pleading contains no allegation of new matter. A jury trial resulted in a verdict for the defendant and from the ensuing judgment the plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Benjamin L. Eddy.*

For respondent there was a brief with oral arguments by *Mr. Albert Abraham* and *Mr. Oliver P. Coshow.*

MR. JUSTICE BURNETT delivered the opinion of the court.

1. A minor exception will be first determined. It is to the effect that the court erred in refusing to instruct the jury in substance that it is presumed that things in the possession of a person are owned by him; that a person is the owner of property upon exercising actual ownership over it, and that until these presumptions are overcome by other evidence the jury is to accept them as binding so far as they apply to the facts of the case. It is true that Section 799, L. O. L., gives these in the list of disputable presumptions. The requests of the plaintiff to instruct the jury about them would have been proper, except for the fact that he sought to make them binding and conclusive. Such legal probabilities are sufficient to support a *prima facie* case but the qualification appended would impart to them a quality not men-

tioned in the statute. For that reason the court was not in error for refusing the direction as propounded.

2. It is contended by the plaintiff that the testimony was to the effect that Howard and Smith were doing business as partners under an assumed name of "The Roseburg Garage" and that Smith as an individual was trading under the assumed name of "Duffy Auto Company," all without having registered the same as provided by Chapter 154 of the Laws of 1913, p. 270. This statute requires such business names to be certified to the county clerk of every county in which the traffic is to be conducted. After making certain declarations about procedure and to whom the act shall apply, it is said in Section 5:

"No person or persons carrying on, conducting or transacting business as aforesaid, or having any interest therein, shall hereafter be entitled to maintain any suit or action in any of the courts of this state without alleging and proving that such person or persons have filed a certificate as provided for in section 1 and failure to file such certificate shall be *prima facie* evidence of fraud in securing credit."

The plaintiff claims that Smith alone constituted the Duffy Auto Company; that he transferred the property in question to the defendant who continued under the same name, both without conforming to the statute mentioned. This enactment was construed in *Beamish* v. *Noon,* 76 Or. 415 (149 Pac. 522). The substance of that decision was that the statute merely disqualified the party from bringing an action and that the defect was waived by failing to answer or demur in case it appeared upon the face of the pleadings. A demurrer lies when the pleading attacked shows on its face, among other things, that the plaintiff has not legal capacity to sue: Section 68, L. O. L.

By Section 71, L. O. L., we find that when any of the matters enumerated in Section 68 do not appear upon the face of the complaint, the objection may be taken by answer, and Section 72 reads:

"If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

In alleging the property to be his own and demanding its redelivery, the defendant practically instituted a cross-complaint in replevin. If, on account of having acquired the title from one acting under an unregistered, assumed business name, or on account of his own like conduct he was disqualified to maintain the action, his adversary should have pleaded it either by demurrer or reply. Not having done so he has waived the same and cannot now urge it.

3, 4. The plaintiff maintains also that in making the alleged sale to the defendant, Smith violated what is known as the Bulk Sales Law, which in its amended form is found in Chapter 281, p. 537, Laws of 1913. The substance of the charge in this respect is that Smith transferred practically all his property in trade to the defendant without making a sworn statement of the names and addresses of his creditors, together with the amounts of indebtedness due to each of them, and that on the other hand the defendant here did not notify such creditors of his intention to buy. The act merely attaches to such conduct a conclusive presumption that the purchase, sale or transfer is fraudulent and void as to any and all creditors of the vendor. The effect of this law is to create a statutory fraud. Upon such a deceit the plaintiff

essays to rely before us and contends that the court was in error in refusing to instruct the jury on the subject or to allow evidence that the sale was in violation of the statute. The pleadings, however, are utterly silent on this subject. It is said in 20 Cyc. 734:

"Where fraud is an essential ingredient of the cause of action or defense it must be pleaded and proved. It is never presumed."

To the same purport are *Walker* v. *Goldsmith,* 14 Or. 123 (12 Pac. 537); *Leasure* v. *Forquer,* 27 Or. 334 (41 Pac. 665), and *Leavengood* v. *McGee,* 50 Or. 233 (91 Pac. 453). The fraud of defendant and his vendor, although of statutory origin, constitutes a ground of defense on the part of the plaintiff against the defendant's assertion of title. The legislation cited vests in creditors a right which when acting for themselves they are at liberty either to assert or ignore. If the trustee as their representative would avail himself of it he must plead it.

The contention of the plaintiff on this subject is presented in another form. The defendant as a witness on his own behalf testified about having advanced money to Smith, only part of which had been repaid, and to making an arrangement about August 28, 1915, whereby in consideration of that indebtedness and an additional sum of money then paid to him Smith transferred the property in question to the defendant. The plaintiff sought to develop on cross-examination of the defendant all he claims with respect to the violation of the Bulk Sales Law and the statute against doing business under an unregistered assumed name. In Section 860, L. O. L., it is said:

"The adverse party may cross-examine the witness as to any matter stated in his direct examination, or

connected therewith, and in so doing, may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination."

5–8. The subject of Johnson's testimony was a sale consummated between himself and Smith wherein the latter was the vendor and the witness himself the vendee. It was manifestly good as between themselves. The Bulk Sales Law only creates a conclusive presumption that such a sale is void as against creditors. It is clear that even then it is void only at the option of such creditors. Having testified only to a sale between himself and Smith, the witness could be cross-examined as to all the elements going to make up such a transaction. The circumstances of the sale, the payment of consideration, the time when and the place where, might be developed on cross-examination because these are essential elements of and necessarily connected with what the witness asserted was a sale. Whether or not the same was void as to other persons at their election is an entirely different matter and is not a subject of cross-examination. *Ah Doon* v. *Smith,* 25 Or. 89 (34 Pac. 1093), cited by the plaintiff was where the plaintiff testified on his own behalf to the bald fact that he had loaned the defendant the amount mentioned in the complaint. Called upon in cross-examination for time, place, and circumstances, he disclosed that it was money which he had let the defendant have in the course of gambling with each other and which he had won again in that very game. On the ground of public policy and not to enforce any right of the defendant the court dismissed the action *sua sponte,* leaving the parties where it found them. There the moving party sought to affirm an unlawful transaction. Here if the actor

in the litigation would disaffirm a convention valid as between the immediate participants, but which is void only at the option of those he represents, he should present averments adapted to that purpose. The case just noted is not apropos here.

The plaintiff is endeavoring to apply to the cross-examination what is styled in the note to *St. Louis etc. Ry. Co.* v. *Raines,* 17 Ann. Cas. 1, as the "Orthodox Rule." By that so-called precept

"when a party produces a witness who is sworn and examined, the opposing party is not confined in his cross-examination to the matters upon which the witness is examined in chief, but may extend the cross-examination to every issue in the case."

On the contrary, as stated in the same note,

"according to the weight of authority in the United States, the cross-examination of a witness is limited to an inquiry into the facts and circumstances connected with the matters brought out on the direct examination of the witness."

Section 860, L. O. L., is a statutory declaration of the American rule and in our judgment was properly applied by the Circuit Court. Reduced to its lowest terms, the contention of the plaintiff is that without pleading a defense to the defendant's claim it may be proved by cross-examination of the defendant. The testimony sought to be adduced to establish the statutory fraud created by the Bulk Sales Law was irrelevant because there was no pleading to support it. The same may be said of the contentions of the plaintiff about the acts of Smith and Johnson constituting a preference within the meaning of the bankruptcy law. The rule is thus laid down in 2 Loveland on Bankruptcy, Section 545.

"In a suit to recover a preference the trustee should allege and prove the filing of the petition in bankruptcy, the adjudication and his appointment and qualification as trustee of the estate of the bankrupt. * * He should also allege and prove all the statutory elements constituting a preference, and that the person receiving it, or his agent, had a reasonable cause to believe that it was in effect a preference. * * If the trustee fails to allege any one of these elements, his bill, declaration or petition is bad on demurrer."

Various assignments of error are pressed upon our attention, but fairly considered, they all urge upon us a question which should have been pleaded but was not. The judgment of the Circuit Court is affirmed.

AFFIRMED. REHEARING DENIED.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS concur.

Filed October 16, 1917.

SUPPLEMENTAL OPINION.

(167 Pac. 1014.)

Department 1. MR. JUSTICE BURNETT delivered the opinion of the court.

9. Subdivision 40 of Section 799, L. O. L., is in these words:

"Every sale of personal property, capable of immediate delivery to the purchaser, and every assignment of such property, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the seller or assignor, during his possession, or as

against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such sale or assignment that the same was made in good faith, for a sufficient consideration, and without intent to defraud such creditors or purchasers; but the presumption herein specified does not exist in the case of a mortgage duly filed or recorded as provided by law."

Among others, it was assigned as error that the trial court refused to give an instruction to the jury embodying this excerpt from the code. The principal effort of the former opinion was to enunciate the doctrine that he who would attack for fraud a transaction valid as between the immediate parties to it, must allege and prove the deceit upon which he relies; and that not having put in such a plea, the plaintiff must fail in his assault upon the title of the defendant along that line. All that was said in our former opinion relating to the requested charge now under consideration was in the last paragraph which grouped all the assignments of error, not otherwise treated in detail, and dismissed them as urging upon us matter which should have been but was not pleaded. This is sufficiently amplified in this supplemental opinion by the statement that the only application possible to be made of the desired instruction would be to an issue of fraud which as already stated is not raised by the pleadings. It would have directed the jury into the investigation of an abstract question foreign to the case and for that reason would have been erroneous.

MR. CHIEF JUSTICE MCBRIDE, MR. JUSTICE BENSON and MR. JUSTICE HARRIS, concur.

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1. Laws of 1915, page 43, makes the state veterinarian state recorder of brands, and requires all brands to be recorded with him and not elsewhere, and provides that "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted in any court of this state, unless the brand shall have been recorded as provided in this act," and that one who has had a brand recorded in any county for the greatest length of time shall have the exclusive right for 60 days to have said brand recorded. G. had had the brand HU recorded in his county under a prior statute, but failed to comply with the 1915 law. M. had complied with the 1915 law and secured a certificate of his exclusive right to the use of the same brand. R. was charged with stealing a steer subsequent to the time when the 1915 law became effective. There was testimony that R. had killed a steer, and that the hide from such steer had an HU brand; R. claiming that he had bought the steer. *Held,* that a certified copy of the certificate issued to M. was properly admitted in evidence, and that a certified copy of G.'s certificate as well as oral evidence that G. had placed an HU brand on the right hip of his cattle was properly excluded. (State v. Randolph, 172.)

Animals—Constitutional Law—Brands—Statutory Regulation—Vested Rights.

2. Laws of 1915, page 43, providing that ownership or identification of stock shall not be permitted to be proved by brands not recorded, since it does not make recorded brands conclusive evidence of ownership, is not invalid; it being merely a rule of evidence in which no one has a vested right. (State v. Randolph, 172.)

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APPEAL AND ERROR.

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1. On motion to dismiss, in the absence of legislative authority, the Supreme Court will not consider the sufficiency of the sureties upon the undertaking on appeal. (Ranzau v. Davis, 26.)

Appeal and Error—Substantial Controversy.

2. Suit to enjoin levy and sale of land on the ground that plaintiff is the true owner raises a substantial controversy whether plaintiff is the owner of the property, and whether, if it is found to be his, it can be subjected to payment of the debt of another, though the land has already been sold on execution and such sale confirmed. (Ranzau v. Davis, 26.)

Appeal and Error—Instructions—Necessity of Requests.

3. Complaint may not be made of instruction substantially giving the law; more specific or different instruction not being requested. (Elling v. Blake-McFall Co., 91.)

Appeal and Error—Stay of Proceedings—Counter Undertaking—"Suit on a Contract."

4. An action for damages for breach of a contract is a suit on a contract, within Section 553, L. O. L., providing for the enforcement of judgments in such suits, notwithstanding an appeal and an undertaking for stay of proceedings upon the giving of a counter undertaking. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Appeal and Error—Scope of Review—Requests for Instructions.

5. In the absence of request for a proper instruction upon a proposition at issue, it will not be considered on appeal. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Appeal and Error—Review—Assignments of Error.

6. Where error in the admission of evidence is argued in the brief, but no such error is assigned, the question is not before the appellate court for review. (Albright v. Keats Auto Co., 134.)

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7. Where appellate court finds no motion for new trial in the record, it cannot consider alleged error in denying such motion. (Albright v. Keats Auto Co., 134.)

Appeal and Error—Review—New Trial—Grounds—Excessive Damages.

8. The appellate court will not review the discretion of the Circuit Court in refusing to grant a new trial on the ground that damages are excessive. (Albright v. Keats Auto Co., 134.)

Appeal and Error—Scope of Review—Record—What Constitutes.

9. Where statements set forth in supplemental affidavits did not appear in the stenographer's notes of the trial, they were nevertheless a part of the record on appeal where the court found them to be true, and incorporated them in the bill of exceptions. (Webb v. Isensee, 148.)

Appeal and Error—Decisions Reviewable—Order Relating to New Trial.

10. Where a final decree was entered dismissing a suit with prejudice, a motion subsequently filed to set aside such decree and asking for an order changing venue, amounted to a motion for a new trial, and an order denying such motion was not appealable, and motion to dismiss an appeal therefrom will be sustained. (Purdy v. Winters' Estate, 188.)

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11. In suit by surety on contractor's bond to determine to whom it should pay, where judgment was rendered against the surety, and against one of the contractors and the administrator of the other contractor, the administrator was a necessary party on appeal by written notice under Section 550, L. O. L., as amended by Laws of 1913, page 617; the judgment debtors presumably having the right of contribution. (Southwestern Surety Ins. Co. v. Foster, 206.)

Appeal and Error—Question for Review.

12. On appeal in suit to recover unpaid stock subscriptions, wherein defendant pleaded a decree of the Circuit Court allowing his claim against the insolvent corporation, where the decree of the circuit judge in the suit modifying and disregarding the findings of the circuit judge allowing the claim will be reversed and the suit dismissed, as prayed in defendant's answer, it is unnecessary to pass on defendant's claim against the corporation. (Farrell v. Davis, 213.)

Appeal and Error—Harmless Error—Instruction.

13. In a railroad employee's action for injuries on a trestle, in the absence of request by the road for an instruction that it was under duty to use ordinary care to make the trestle reasonably safe, where there had been utter lack of diligence of the road's servants in respect to taking precautions for the safety of persons passing over its road, the omission to give such an instruction was harmless to the road. (Emerson v. Portland E. & E. R. Co., 229.)

Appeal and Error—Trial—Findings of Fact—Weight of Evidence—Review.

14. The weight of the evidence is for the court, and its findings of fact in a law action are conclusive if there is any evidence to support them. (California Trojan Powder Co. v. Wadhams & Co., 307.)

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15. Where on appeal an order was made extending the time in which to file "a transcript of the testimony and proceeding" until July 10th, the word "proceedings" was broad enough to cover the entire transcript, and a filing on April 8th was sufficient. (Freeman v. Southern Pac. Co., 330.)

Appeal and Error—Notice of Appeal—Parties to be Served—"Adverse Party."

16. In pedestrian's action against city and its officers for injuries, where the city went out on nonsuit, failure of the other defendants to serve notice of appeal on the city was not ground for dismissal

of the appeal, in that the city was an "adverse party," within Section 550, L. O. L. (Colby v. City of Portland, 359.)

Appeal and Error—Reversible Error—Admission of Incompetent Testimony.

17. In an action for injuries alleged to have been caused by the failure of defendant railway's servant to render suitable assistance to plaintiff disembarking from its car, permitting one familiar with the road in question to testify, over objection, that at some stations there would be good platforms and at others, used by a very small number, the platforms were rough, etc., was not reversible error; the evidence not being sufficiently material, although it may have been incompetent. (Nelson v. United Railways Co., 427.)

Appeal and Error—Review—Scope and Extent—Misjoinder of Causes.

18. Where no demurrer for misjoinder of causes was interposed, and a motion to compel plaintiff to elect between causes was withdrawn or overruled by consent, the Supreme Court will, notwithstanding the contention that a cause of action for rescission and one to set aside a declaration of forfeiture cannot be joined, consider both causes on the merits. (Stennick v. J. K. Lumber Co., 444.)

Appeal and Error—Harmless Error—Ruling on Demurrer.

19. Error in overruling a demurrer for misjoinder of causes was harmless; the case having proceeded as a suit on one of them only. (Stennick v. J. K. Lumber Co., 444.)

Appeal and Error—Objections in Lower Court—Complaint—Sufficiency.

20. The objection that a complaint does not state facts sufficient to constitute a cause of action is never waived, and may be raised for the first time in the Supreme Court. (Davis Lum. Co. v. Coats Lum. Co., 542.)

Appeal and Error—Review—Necessity of Bill of Exceptions.

21. For review of the entry of a separate judgment on the separate verdict against defendants, sued as joint tort-feasors, bill of exceptions is not necessary; Section 172, L. O. L., providing that no exception need be taken to a decision on a matter of law, when it is entered in the journal, or made wholly on matters in writing and on file in the court. (Chrudinsky v. Evans, 548.)

Appeal and Error—Action for Joint Tort—Verdict—Right to Complain.

22. Defendants, sued as joint tort-feasors, and not merely plaintiff, may complain of verdict and judgment against defendants in different amounts. (Chrudinsky v. Evans, 548.)

Appeal and Error—Remand—Proceedings Below.

23. Where, on appeal, defendant's motion to vacate decree and permit an answer is disposed of adversely to her, the trial court properly denied such a motion after entry of decree in conformity to the mandate. (Anderson v. Phegley, 627.)

Appeal and Error—Harmless Error—Requiring Election Between Defenses.

24. Where the court erroneously required defendant to elect between two defenses and he chose the first, the judgment should be

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Arrest—Property in Possession of Prisoner—Right of Possession.

2. Clerk of court cannot, under Sections 1705–1713, L. O. L., providing for custody and disposal of stolen or embezzled property, retain possession of bank note, taken from person convicted of obtaining money on fraudulent checks, but his property, as against plaintiff claiming as convict's assignee, where it was deposited with clerk for use as evidence on criminal trial, and clerk holds it for defrauded merchants, but only if he connects himself with proceeding by such merchants whereby custody of note is secured by officer under legal writ. (Hickey v. Coffey, 383.)

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Attachment—Statute—To Whom Applicable.

1. Under Section 7427, L. O. L., providing that whenever any machinist, artisan, laborer, etc., shall have furnished or procured any materials for use in the construction, etc., of any building or other improvement, such materials shall not be subject to an attachment, etc., to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction or repair of such building, structure or improvement; plaintiff, who sold powder to be used in the construction of a logging road, would be entitled to protection against an attachment, the statute not being designed for the benefit of judgment debtors only. (California Trojan Powder Co. v. Wadhams & Co., 307.)

Attachment—Notice of Claim.

2. The exemption from attachment for materials furnished under Section 7427, L. O. L., is an absolute one, and plaintiff was not required to make a timely claim thereof before sale in order to avail himself of the exemption. (California Trojan Powder Co. v. Wadhams & Co., 307.)

Attachment—Bad Faith—Burden of Proof.

3. Under Section 7427, L. O. L., exempting from attachment materials furnished for use in the construction of a building, or other improvement, the burden was on the attachment creditor to show bad faith in the purpose for which the materials were on the ground. (California Trojan Powder Co. v. Wadhams & Co., 307.)

Attachment—Wrongful Attachment—Proximate Cause.

4. Where plaintiff, under Section 7427, L. O. L., had the right to a lien for materials furnished, and the exclusive right of attachment, defendant's attachment suit, which deprived plaintiff of both his rights, leaving his debt unpaid, was the proximate cause of the injury from wrongful attachment. (California Trojan Powder Co. v. Wadhams & Co., 307.)

ATTORNEY AND CLIENT.

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Sufficiency of Evidence.

1. Evidence *held* insufficient to warrant recovery for services performed by plaintiff at request of defendant's attorney in obtaining evidence in a suit by defendant, where the attorney had no authority to employ plaintiff, and his fees and expense account were specifically limited, and defendant not having ratified the account, nor having been informed of it. (Davis v. Liverpool & London & Globe Ins. Co., 141.)

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Ratification—Acceptance of Amount Collected.

2. The mere fact that defendants accepted money recovered by their attorney would not amount to a ratification of a void contract

made by attorneys with plaintiff for obtaining evidence in the suit, unless defendants knew that the attorneys had assumed to act for them in employing plaintiff. (Davis v. Liverpool & London & Globe Ins. Co., 141.)

Attorney and Client—Client's Liability for Expenses Incurred by Attorney—Ratification—Knowledge.

3. The mere fact that defendant may have had knowledge that plaintiff was furnishing information to defendant's attorneys and assisting them in finding testimony for defendant's suit would not be notice to defendant that plaintiff was doing it with the expectation that he would be paid by defendant out of the company's share of the amount recovered in the suit. (Davis v. Liverpool & London & Globe Ins. Co., 141.)

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4. Although an attorney may employ as many assistants in a case as he chooses to pay for, his client will not be liable therefor, unless informed of the employment, and thereafter permits it to continue. (Davis v. Liverpool & London & Globe Ins. Co., 141.)

See Limitation of Actions, 2.
See Statute of Frauds, 3.
See Trial, 4, 10.

AUTHORITY.

See Principal and Agent, 2, 3, 5.

AUTOMOBILES.

Injury by Collision of Autos.

See Master and Servant, 1.

Injury by Being Run Down by Automobile.

See Damages, 7, 8.
See Master and Servant, 2–9.

Contract of Sale and Warranties.

See Sales, 6–10.

BAD FAITH.

See Attachment, 3.
See Insurance, 1.

BANKRUPTCY.

Bankruptcy—Recovery of Deposit from Lessor—Rescission of Lease—Deposit.

1. The trustees in bankruptcy of a lessee corporation, on surrender or rescission of the lease by the landlord when the lessee was not in default, were entitled to repayment by the landlord of the money deposited as security for payment of rent or performance of the covenants of the lease; if the lessee was in default, they were entitled to the deposit, less the amount of rent due and in arrears and compensation for preceding breaches of the lease. (Alvord v. Banfield, 49.)

Bankruptcy—Action by Trustee—Necessity of Pleading Preference.

2. A bankrupt's trustee, claiming that acts of bankrupt and another constituted a preference must plead such preference. (Benson v. Johnson, 677.)

See Contracts, 2.

BAR.

See Criminal Law, 11.

BENEFIT ASSESSMENTS.

See Municipal Corporations.

BEQUESTS.

Specific or General.

See Wills, 5.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILLS AND NOTES.

See Vendor and Purchaser, 6.

BONDS.

See Municipal Corporations, 23–30, 36.

BRANDS.

See Animals, 1, 2.

BREACH.

See Contracts, 5–7.

BULK SALES LAW.

See Fraudulent Conveyances, 3–5.
See Witnesses, 5.

BURDEN OF PROOF.

See Attachment, 3.
See Evidence, 5.
See Insurance, 6, 9, 10.
See Principal and Agent, 1.

CARRIERS.

Carriers—Safe Place to Disembark—Duty of Railway Company.

1. It is the duty of a railway company to provide safe and convenient means for entering and leaving its vehicles, but it is not bound to exercise an infallible judgment in such matters. (Nelson v. United Railways Co., 427.)

Carriers—Injuries to Passengers—Safe Place to Disembark—Questions for Jury.

2. Whether the failure of defendant's servants to furnish a stool for plaintiff to step on when she alighted from the car constituted

negligence on the part of the railway, or whether the brakeman rendered proper and adequate support when she disembarked at the station, were questions for the jury. (Nelson v. United Railways Co., 427.)

CASES IN THE OREGON REPORTS.

Applied, Approved, Cited, Distinguished, Followed and Overruled in This Volume.

See Table in Front of this Volume.

CHARTER OF CITIES.

MEDFORD.

See Colby v. City of Medford, 485.

PORTLAND.

See Askay v. Maloney, 343.
See Colby v. City of Portland, 359.
See Duniway v. Wiley, 86.
See Lawrence v. City of Portland, 586.

CITIES.

See Municipal Corporations.

CITY CHARTERS.

See Charter of Cities.

CITY ORDINANCES.

See Municipal Corporations.

COMPROMISE AND SETTLEMENT.

Compromise and Settlement—Nature and Requisites.

1. A settlement and compromise of a claim asserted on reasonable grounds and in good faith, which the parties, having equal knowledge of the facts, consider doubtful, constitute a new and valid agreement, which will be enforced in law, although the matter compromised be not in fact doubtful in legal contemplation, and the settlement be not what a court would have adjudged upon the facts of the case. (Young v. King, 22.)

Compromise and Settlement—Enforcement—Defenses.

2. In an action to recover $1,000 as damages for breach of agreement of defendant to give a note for that amount in settlement of a dispute between parties, a plea that defendant deposited note with another party for benefit of plaintiff according to contract, but that plaintiff refused to accept it, set up a good defense. (Young v. King, 22.)

Compromise and Settlement—Enforcement—Defenses.

3. In an action to recover $1,000 as damages for breach of agreement of defendant to give a note for that amount in settlement of a dispute between parties, plea alleging that said dispute arose out

of a prior contract, from the performance of which the defendant was for various reasons excused, did not set up a defense, since defendant confesses to the new stipulation, the legal effect of which is to supersede all former contracts and contentions. (Young v. King, 22.)

Compromise and Settlement—Enforcement—Defenses.

4. In an action to recover $1,000 for breach of agreement to give a note for that amount in settlement of a dispute between the parties, plea alleging that said dispute arose out of a prior contract under which plaintiff paid money to defendant, and another, who was therefore a necessary party to the suit sets up no defense, since defendant confesses to the new stipulation, the legal effect of which is to supersede all former contracts and contentions. (Young v. King, 22.)

CONDITION PRECEDENT.

See Contracts, 1.
See Executors and Administrators, 5.
See Indians, 1, 2.

CONDITIONAL SALE.

See Sales, 1–3.

CONSANGUINITY.

See Marriage, 3.

CONSIDERATION.

Contract to Saw Timber.

See Logs and Logging, 2.

Action to Recover Money Paid as Consideration.

See Vendor and Purchaser, 7–12.

CONSORTIUM.

See Damages, 6.
See Husband and Wife, 1.

CONSTITUTIONAL LAW.

Constitutional Law—Intoxicating Liquors—Prohibiting Manufacture—Constitutionality.

1. Article I, Section 36, of the Constitution, as amended (see Laws 1915, page 12), forbidding the manufacture of intoxicating wine for the maker's own use, does not violate the Fourteenth Amendment of the U. S. Constitution. (State v. Marastoni, 37.)

Constitutional Law—Obligation of Contract—Amendment of Charter.

2. Article I, Section 10, of the United States Constitution, prohibiting a state from enacting any law impairing the obligation of contracts, applies to cities and towns, where they amend their own charters, as they are only agencies of the state, having only the powers which the state has delegated to them. (Colby v. City of Medford, 485.)

Constitutional Law—Impairing Obligation of "Contract."

3. The term "contract," as used in Article I, Section 10, of the United States Constitution, is given its ordinary meaning, and means

a voluntary agreement of minds, upon a sufficient consideration, to do or not to do certain things, and embraces and includes all those laws which exist at the time and place where the contract is executed and where it is to be performed, and affect the validity, construction, discharge and enforcement of the contract. (Colby v. City of Medford, 485.)

Constitutional Law—"Obligation of Contract"—"Impairing Obligation of Contract."

4. The "obligation of a contract" is the law or duty which binds the parties to perform their agreement, which depends upon the laws in existence when the contract is made; hence, if the duty to perform is lessened, and either party is deprived of the benefit of his contract, or new conditions imposed, adding new duties, either by the repeal or passage of a statute, the obligation of the contract is "impaired," within the meaning of Article I, Section 10 of the United States Constitution; but this does not prohibit a change in the remedy if the new remedy is as substantial as the other. (Colby v. City of Medford, 485.)

Constitutional Law — Indictment and Information — Intoxicating Liquors—Constitutional Requirements.

5. Neither does such act violate the Fourteenth Amendment providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (State v. Wilbur, 565.)

See Animals, 2.
See Indictment and Information, 2, 3.
See Municipal Corporations, 14, 20, 24, 25, 32.
See Statutes, 3.

CONSTITUTION OF OREGON.

Cited and Construed in this Volume.

See Table in Front of this Volume.

CONSTITUTION OF UNITED STATES.

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CONSTRUCTION.

See Contracts, 4, 9.
See Corporations, 1.
See Courts, 1.
See Stipulations, 1.
See Trusts, 2, 6.

CONTRACTS.

Contracts—"Condition Precedent."

1. A "condition precedent" is a condition which calls for the performance of some act or the happening of some event after the terms

of the contract have been agreed upon, and before the contract shall take effect. (Rogers v. Maloney, 61.)

Contracts—Discharge by Bankruptcy.

2. Where an orchard company, which had contracted to sell orchard lands, went into bankruptcy, the bankruptcy did not impair the obligations of the company's contract with its vendee, nor lessen his privileges under it, and did not foreclose his interest in the land; he not being compelled to take title on less favorable terms than those for which he stipulated. (Stewart v. Mabb, 68.)

Contracts—"Undue Influence"—"Due Influence."

3. Solicitation, importunity, argument and persuasion are not "undue influence" sufficient to avoid a contract. Influence obtained by persuasion and argument, or by appeals to the affections is not prohibited and may be termed "due influence," and it is immaterial that the parties stand in confidential relations to each other. The line between "due" and "undue" influence when drawn must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as the claims of kindred, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice. Influence obtained by flattery, importunity, superiority of will, mind or character which gives dominion over the will of another to such an extent as to destroy his agency, or constrain him to do against his will what he is unable to refuse, is "undue influence." (Coleman v. Coleman, 99.)

Contracts—Construction—Arbitration.

4. A construction contract reserving to the owner's engineer the right to inspect the building does not make him the arbiter of compliance with specifications so as to render his acceptance or failure to object binding upon the owner. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Contracts—Breach—Waiver.

5. To constitute acceptance of a building or approval of the work and material a waiver or estoppel, it must appear that the owner knew of the defects which he afterward complained of, since waiver cannot be imputed in the absence of knowledge. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Contracts—Breach—Waiver—Instructions.

6. In building owner's action against the contractor for damages for defective work, a requested instruction that approval of the building bound the plaintiff after his examination was properly refused as omitting plaintiff's knowledge of the defects, since mere examination does not always impute knowledge especially of latent defects. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Contracts—Breach—Estoppel.

7. Mere inspection of work by the building owner or its agents does not so conclusively estop it as to prevent its recovering damages for hidden defects of construction or amount to a waiver of faults discovered after the completion of the work. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Contracts—Rescission—Fraud—Evidence.

8. Where it is sought to set aside a contract for fraud, the evidence should be clear and satisfactory; it being a maxim of law that fraud is never presumed. (Stennick v. J. K. Lumber Co., 444.)

Contracts—Construction—Forfeiture.

9. Courts are reluctant to enforce a forfeiture, and no language will be construed to work one where a contrary intent can be derived from a consideration of the whole instrument or from the circumstances attending its execution. (Stennick v. J. K. Lumber Co., 444.)

Contracts—"Forfeiture"—"Penalty"—Distinction.

10. In contracts and in civil matters generally the term "penalty" imports a clause by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract; while "forfeiture" is a broader term, including not only the payment of money, but the loss of property or of some right by reason of failure or neglect of a party to perform a contract. (Stennick v. J. K. Lumber Co., 444.)

Contracts—Performance—Forfeiture for Breach.

11. Declaring a forfeiture for breach of conditions of a contract is not a rescission of the contract, but the assertion of a right growing out of it. (Stennick v. J. K. Lumber Co., 444.)

See Constitutional Law, 2–4.
See Evidence, 1, 7.
See Logs and Logging, 1, 2–8.
See Marriage, 1, 2.
See Master and Servant, 9.
See Municipal Corporations, 24–26, 44, 45.
See Principal and Agent, 1, 4, 5.
See Sales, 2, 6, 8.
See Statute of Frauds, 3, 4.
See Vendor and Purchaser, 1–5.

CONTRIBUTORY NEGLIGENCE.

See Master and Servant, 1, 11.
See Trial, 5.

CORPORATIONS.

Corporations — Subscription Agreement — Construction — "Denouncement."

1. An instrument, reciting that two persons have "denounced" ten mineral claims in the state of Panama, and stating that the owners of the oil field offer a one-third interest payable on receipt of a telegram from one of them that an opportunity is open to subscribe for stock in the proposed company, and providing for a preliminary payment to be telegraphed to the order of such owner, the balance to be due and payable as soon as the first lease shall be drawn which would bind the lessee to drill and develop the land, and that as soon thereafter as the survey was completed and titles obtained, there should be organized an ownership company to own and control the company, and stock issued to different subscribers in proportion to the amounts subscribed and paid in, and providing that the signer subscribes the

amount set opposite his name to the Panama oil fund, amounted to a preliminary subscription to the stock of a corporation to be organized as a holding company for the purpose of exploiting the oil property; a "denouncement" being a claim to work an alleged abandoned mine, reported to the authorities or the report of the discovery and pre-emption of and claim to a new mine. (Stewart v. King, 14.)

Corporations—Right of Stockholders—Action Against Promoters.

2. Where a person made a preliminary subscription to stock of a corporation to be organized and the money was applied to fully paying up the shares of stock which were issued, the money so paid became funds of the corporation in the hands of the promoters; and, in the absence of any showing that the corporation has been remiss in its duty, or its controlling officers have refused to act, such person has no cause of action against one of the promoters directly for a recovery of his money paid on the ground that such promoter has never caused land to be conveyed to the corporation as contemplated. (Stewart v. King, 14.)

Corporations — Stockholders — Action Against Promoter — Necessary Parties.

3. In an action by one who subscribed for stock before the formation of a corporation, against one of the promoters who received the money, another promoter, who did not receive any of the money sought to be recovered, was not a necessary party defendant merely because he has an interest in the embryo title to the land. (Stewart v. King, 14.)

Corporations—Stockholders—Action Against Promoters—Defense.

4. In an action by a subscriber to stock against one of the promoters of the corporation to recover the money paid, on the ground that defendant had not secured title to oil lands and conveyed the same to the corporation as agreed, the fact that defendant and the other promoter had been diligent in their efforts to acquire title was not a defense, in the absence of a showing when they should have acquired title. (Stewart v. King, 14.)

Corporations—Issue of Stock—Statute—"Actual Fraud"—"Property."

5. Under Section 6696, L. O. L., providing that in the absence of actual fraud the judgment of the directors of a corporation as to the value of property for which they issue stock shall be conclusive, "actual or positive fraud" consisting in circumventing, cheating or deceiving a person, to his injury, by any cunning, deception, or artifice, and a contract right being a chose in action, and therefore "property," where directors issued stock for an exclusive right to market the products of another corporation for a term of years, which all concerned believed to be a valuable contract, the fact that the contract turned out to be of little or no value, not being sufficient to show fraud on the part of the directors, their judgment will not be revised, or a subsequent purchaser of the stock be held liable as for unpaid subscriptions. (Farrell v. Davis, 213.)

Corporations—Stock Issued at Overvaluation—Right of Creditor.

6. As a general rule, a corporate creditor cannot complain where, at the time he contracted with the company, he knew the stock had been issued for property taken at an overvaluation. (Farrell v. Davis, 213.)

Corporations—Dividends—Persons Entitled—Transfer of Stock.

7. A dividend is usually considered a part of the corporate property until declared, and will pass with the sale or devise of the stock, but when the dividend is declared, it becomes separate and distinct from the stock, and falls to him who is proprietor of the stock of which it was before an incident. (In re Wilson's Estate, 604.)

Corporations—What Constitutes "Dividend"—Necessity of Formal Declaration.

8. Where pursuant to formal resolutions a corporation having no debts conveyed property, and upon the receipt of the consideration for the conveyance it was divided between the two individuals who owned all of the stock, except one share issued to a third person to qualify him as director, and they thereafter treated the funds received as their own, this amounted to a "dividend," as a division of profits, without the formality of declaring a dividend is equivalent to a dividend. (In re Wilson's Estate, 604.)

Corporations—Meetings of Directors—Place of Meeting—Ratification.

9. The informality of a corporate meeting held outside the state may be waived by the shareholders and the act ratified by their subsequent consent and acquiescence. (In re Wilson's Estate, 604.)

Corporations—Ratification of Acts of Officers.

10. A voidable act by the officers of a corporation may be ratified by the stockholders so as to estop the corporation from afterwards maintaining an action to undo it. (In re Wilson's Estate, 604.)

Corporations—Ratification of Acts of Officers.

11. Where the owners of all the stock of a corporation divided the proceeds of a sale of corporate property and thereafter treated the funds received as their own, the corporation ratified this division of the proceeds by failing to disavow it after knowledge. (In re Wilson's Estate, 604.)

COSTS.

Costs—On Appeal—Reversal.

1. Although both parties appeal, where the reversal of the judgment operated to defendant's advantage, it was entitled to costs and disbursements. (Maxson v. Ashland Iron Works, 345.)

Costs—Cost Bill—Objections.

2. Sections 569, 570, L. O. L., providing for the taxing of costs and disbursements, declare that no disbursements shall be allowed to any party, unless he shall serve upon such adverse party or parties as are entitled to notice by law, and file with the clerk five days after rendition of judgment, his statement, with proof of service, if notice to the adverse party is required, showing with reasonable certainty the items of all disbursements, that the statement of disbursements thus filed and costs shall be entered as of course by the clerk as part of the judgment or decree, unless the adverse party, within five days from the expiration of the time allowed to file such statement, shall file his objections thereto, and that, as soon as convenient after objections are filed, the court or judge thereof shall proceed to hear and determine all the issues involved. Defendants

served on plaintiff a bill of costs and disbursements, and on the following day plaintiff filed its objections. Several days thereafter, within the time limited, defendants filed their cost bill, which had already been served. *Held*, that as the cost bill was duly filed, and the objections were directed to it, they will not be disregarded because they were filed before the cost bill itself was filed. (Macleay Estate Co. v. Miller, 623.)

Costs—Allowance—Witness Fees.

3. Section 566, L. O. L., declares that a party entitled to costs shall recover all necessary disbursements, including the fees of officers and witnesses. Section 567 declares that in a suit in equity costs and disbursements shall be allowed to the party in whose favor a decree is given in an action. *Held*, that the disbursements are to be confined to what is necessary, and where defendants by their answer showed that a suit apparently to settle a disputed boundary involved a title to land, and that the ordinary action of ejectment was proper, and the court, having sustained their contention, dismissed the suit, defendants are not entitled to claim as costs and disbursements fees paid witnesses. (Macleay Estate Co. v. Miller, 623.)

Costs—On Appeal—Expense of Transcript—Taxation.

4. Expense of a stenographic transcript of testimony used on appeal must be claimed and taxed in the Circuit Court, and cannot be taxed as a disbursement in the Supreme Court. (Shepherd v. Inman, Poulsen Lum. Co., 639.)

Costs—On Appeal—Expense of Transcript.

5. Plaintiff filed a supplementary cost bill for a stenographic transcript of testimony for use on appeal after the time allowed by Section 569, L. O. L., providing that no disbursements shall be allowed a party unless he served upon the adverse party and filed with the clerk an itemized statement of his disbursements "within five days after the rendition of the judgment," but providing that such statement may be filed with the clerk at any time after said five days, but not later than the first day of the next regular term after the expiration of the said five days, and that such statement shall be entered by the clerk "as a part of the judgment" in favor of the party entitled to costs. Section 931, L. O. L., provides that when shorthand notes shall have been taken in any case, if the court or either party requests a transcript, the expense thereof shall be paid forthwith by the party ordering the transcript, "and when paid shall be taxed as other costs in the case." *Held*, that the expense of such transcript may or may not be taxable, depending upon whether the judgment is reversed or affirmed, but in no event can become a part of the original judgment, and the bill was filed prematurely, the time within which the supplementary cost bill can be filed commencing to run from the date of the entry of judgment on the mandate, and that, if judgment is affirmed, the item cannot be taxed as a disbursement, or become part of the original judgment, but, if reversed, the item is taxable as a part of the new judgment rendered on the mandate. (Shepherd v. Inman, Poulsen Lum. Co., 639.)

See Executors and Administrators, 7.

COURTS.

Courts—Executors and Administrators—Jurisdiction—Instructions to Executors—Construction of Will.

1. Under Article VII, Section 12 of the Constitution, giving County Courts the jurisdiction pertaining to probate courts, and Sections 934, 936 and 1303, L. O. L., relative to the jurisdiction of such courts and to the distribution and payment of legacies, the County Court, in response to a petition of the executors, may direct them to whom property shall be distributed, and, as incidental to this direction, may construe the will. (In re Wilson's Estate, 604.)

COVENANT.

Covenants—Running With Land.

1. Only real covenants run with the land. (First Nat. Bank v. Hazelwood Co., 403.)

Breach of.

See Landlord and Tenant, 10.

CRIMINAL LAW.

Criminal Law—Appeal and Error—Harmless Error.

1. In the absence of objection, failure to make an entry of an order showing that a person accused of assault and battery stated that the name under which he was tried was his own, as required by Section 1466, L. O. L., *held* harmless error. (State v. Fetsch, 45.)

Criminal Law—Jurisdiction of Court's Sentence.

2. Under Section 1924, L. O. L., as amended by Laws 1911, page 179, providing that, if any person not armed with a dangerous weapon shall assault another or shall commit an assault and battery, he may be fined not less than $50 or more than $500, if tried in the Circuit Court, or not less than $5 or more than $50 if tried before a justice of the peace, a Circuit Court has jurisdiction to impose a fine of $150 in a prosecution commenced in the court of a justice of the peace wherein a fine of only $20 was imposed. (State v. Fetsch, 45.)

Criminal Law—Refusal to Instruct—Prejudicial Error.

3. In a prosecution for stealing a steer, where the evidence for the state was circumstantial, and defendant had offered evidence tending to explain possession, it was prejudicial error to refuse to instruct concerning the possession of the stolen goods. (State v. Randolph, 172.)

Criminal Law—Manner of Pleading.

4. Under Sections 1467–1469, 1490, 1498, 1500, and 1501, L. O. L., prescribing practice as to pleading and demurring to an indictment, and providing that every plea must be oral and entered on the court's journal, stenographer's statement, preceding his report of the testimony, that at opening of trial defendant's counsel stated that defendant pleaded former acquittal of crime charged, is not proper evidence that plea was entered. (State v. Keep, 265.)

Criminal Law—Former Acquittal—Ingredient of Later Crime.

5. Where one from whom defendant has procured a note to be executed, secured by a mortgage on real estate to which the mortgagor has no title, by fraudulent representations sells it to another, defendant furnishing an abstract which he has changed so as to make it appear that mortgagor had title, he cannot, because of his prior conviction of conveying to mortgagor land in question without title, plead former acquittal to an indictment for obtaining money by false pretenses, since such conveyance was merely a preparatory crime not legally related to later crime nor an indispensable ingredient of it. (State v. Keep, 265.)

Criminal Law—Former Acquittal—Ingredient of Later Crime.

6. The conviction of one crime will be deemed acquittal of another only where former transaction is necessarily involved, as a matter of law, as part of the subsequently completed crime. (State v. Keep, 265.)

Criminal Law—Nolle Prosequi.

7. Under Sections 1696, 1697, 1699, L. O. L., only misdemeanors may be compromised. (State v. Keep, 265.)

Criminal Law—Nolle Prosequi—Authority to Allow.

8. Under Sections 1704, 1705, L. O. L., district attorney cannot discontinue or abandon a prosecution for crime unless court, either of its own motion or on application of district attorney, in furtherance of justice orders action dismissed. (State v. Keep, 265.)

Criminal Law—Nolle Prosequi—Authority to Allow.

9. District attorney has no authority to make agreement, binding on grand jury of another county, with one indicted for making conveyance without title, that if he pleads guilty all other prosecutions growing out of same transaction will be dismissed. (State v. Keep, 265.)

Criminal Law—Sufficiency of Evidence—Testimony of Accomplice.

10. One cannot be convicted of obtaining money by false pretenses on the uncorroborated testimony of an accomplice. (State v. Keep, 265.)

Criminal Law—Former Conviction—Pleading—Bar.

11. Where the state elected to try its prosecution for illegally selling intoxicants as for an unlawful sale to a particular person, the choice, being properly induced, having been made a matter of public record, the conviction can be pleaded in bar to any further prosecution for a sale on such occasion to such person. (State v. Wilbur, 565.)

See Intoxicating Liquors, 3, 4.
See Statutes, 2.

CROSS-BILL.

See Partnership, 2.

CROSS-EXAMINATION.

See Witnesses, 3–5.

DAMAGES.

Damages—Liquidated Damages or Penalty—Intention of Parties.

1. As a general rule, the intention of the contracting parties is an important, if not a conclusive, element in determining whether a sum stipulated to be paid in case of breach of contract is to be regarded as liquidated damages or a penalty. (Alvord v. Banfield, 49.)

Damages—Liquidated Damages or Penalty—Preference of Law.

2. The tendency and preference of the law is to regard a stipulation or covenant as of the nature of a penalty rather than as liquidated damages. (Alvord v. Banfield, 49.)

Damages—Liquidated Damages or Penalty.

3. Where there is an agreement to pay, for breach of contract, without regard to its date, a fixed unvarying sum, when, in the nature of things, the date of breach would be all-important in determining the element of actual damages, the stipulation is one for a penalty. (Alvord v. Banfield, 49.)

Damages—Liquidated Damages or Penalty.

4. If actual damages are neither doubtful, speculative, nor difficult of proof, and stipulated damages lose sight of the principle of compensation, the amount stipulated will be treated as a penalty. (Alvord v. Banfield, 49.)

Damages—Liquidated Damages or Penalty—Deposit by Lessee.

5. Where the lessee of an apartment house, deposited $2,500, which, by the lease, was "fixed and agreed upon as the full measure of damages * * in the event that said lessee * * shall violate any of the terms, covenants, or conditions" of the lease, which contained covenants for performance by the lessee of various acts, some of more and some of less importance, it being clear from the lease that the deposit was the lessee's property, as it was to be paid interest during such time as it should not be in default for breach of condition or covenant, the money was deposited as security for performance of the terms of the lease, and should be regarded as a penalty, not as liquidated damages. (Alvord v. Banfield, 49.)

Damages—Question for Jury—Loss of Consortium.

6. Compensation for loss by husband of consortium of wife is to be determined, not by direct evidence of its value, but by the jury from their observation, knowledge and experience. (Elling v. Blake-McFall Co., 91.)

Damages—Amount—Proof.

7. The *quantum* of damages is a fact to be established by the testimony, and cannot be left to surmise or speculation. (Albright v. Keats Auto Co., 134.)

Damages—Instructions—Personal Injuries.

8. In an action for personal injuries, an instruction that if plaintiff was entitled to recover it was for the jury to determine the amount, and if they found for plaintiff to allow her such sum as would fairly and reasonably compensate her for such injuries as she

"may have suffered" by reason of the accident, taking into account her physical suffering, if any, her mental anquish, if any, and the necessary expenses resulting from the accident and loss of time, if any, and that in arriving at this amount jury should find such amount as would be justified by the evidence, laying aside any question of sympathy for the plaintiff or of prejudice against the defendants, did not leave the *quantum* of damages to surmise or speculation, and did not mislead the jury, since there was evidence of physical and mental suffering of plaintiff and of her loss of time and expenses. (Albright v. Keats Auto Co., 134.)

See Landlord and Tenant, 10, 12.
See Libel and Slander, 6, 7.
See Nuisance, 1.
See Trial, 11.

DECLARATIONS.

Declarations of a Deceased Person.

See Evidence, 2.
See Witnesses, 1, 2.

DEDICATION.

Dedication—Evidence—Weight and Sufficiency.

1. Evidence *held* not to establish dedication of a street by user. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acquiescence in Public Use.

2. The permission by the owner of spasmodic or occasional use by the traveling public of uninclosed land is not sufficient to indicate an intent to dedicate the property to public use. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acts Constituting.

3. That a city has passed ordinances referring to land that would be part of street, if extended, as part of that street, and that conveyances of property adjoining such land have been executed, designating it as part of street, cannot deprive owner of premises of his property without his consent. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acts Constituting—Intent.

4. To establish a dedication, owner's acts and declarations should be deliberate, unequivocal and decisive, and manifest a positive and unmistakable intention to permanently abandon his property to the specific public use. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acts Constituting—Intent.

5. To a common-law dedication it is necessary that there be an appropriation of land by the owner to the public, either by express manifestation of purpose to devote land to public use or by acts or course of conduct from which law would imply such an intent. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acquiescence in Public Use—Intent.

6. If the open and known acts of the donor are such as to induce the belief that he intended to dedicate the way to public use, and

the public and individuals act upon such conduct and acquire rights, which would be lost if the owner were allowed to reclaim the land, the law will not permit him to assert that there was no intent to dedicate, no matter what may have been his secret intent. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Estoppel to Deny.

7. Where settler on land, whose heirs subsequently become owners, files a map designating premises as part of a street, he and his successors in interest are estopped to deny that premises were dedicated as a street. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Acts Constituting—Plats.

8. Filing of plat, showing that premises in question are reserved as private property, shows that there was no express dedication of lands to public use by virtue of map. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Capacity to Dedicate.

9. An oral dedication of premises as a street cannot be shown by minutes of a city council reciting declarations of one who was not the owner at the time. (Portland Ry., L. & P. Co. v. Oregon City, 574.)

Dedication—Dedication in Pais—Proof.

10. Dedication by acts *in pais* will not be assumed, without clear evidence manifesting an unmistakable intention to abandon to the public use. (City of Clatskanie v. McDonald, 670.)

Dedication—Dedication in Pais—Sufficiency of Evidence.

11. In a suit to determine an adverse claim to a strip of land in front of a hotel, evidence *held* not to show a dedication to the public as a part of the street. (City of Clatskanie v. McDonald, 670.)

Dedication—Evidence—Levy and Payment of Taxes.

12. Although the levy of taxes does not estop the public from claiming property as a highway, the continuous payment of taxes is evidence rebutting the presumption of a dedication. (City of Clatskanie v. McDonald, 670.)

Dedication—Sidewalk—Estoppel.

13. An owner, who built a hotel, back from the street with a sidewalk to the street line, with a roof over it, and induced other builders to conform to his building line, was not estopped from claiming title, in the absence of a showing that the other property owners constructed their buildings on the line because of their belief that they could use the sidewalk in front of the hotel. (City of Clatskanie v. McDonald, 670.)

DELEGATION OF POWERS.

See Municipal Corporations, 40, 41.

DEMURRER.

See Pleading, 3, 4.

DEPOSIT.

See Bankruptcy, 1.
See Damages, 5.
See Landlord and Tenant, 4, 5.

DISCRETION OF CITY COUNCIL.

As to Street Intersections in Making Paving Assessments.

See Municipal Corporations, 39.

DISCRETION OF COURT.

As to Excessive Damages.

See Appeal and Error, 8.

Judicial Discretion.

See Mandamus, 1.

DIVIDENDS.

See Corporations, 7, 8.

DIVORCE.

Divorce—Fault of Complainant—Right to Relief.

1. Where plaintiff suing for divorce himself showed, that he was a willing participant in the parties' numerous quarrels, and that he resorted to personal violence against defendant at least twice, he was equally in fault, and was not entitled to divorce, on the principle that one who comes into equity for relief must come with clean hands. (Hengen v. Hengen, 155.)

Divorce—Granting of Suit Money—Statute.

2. The granting of suit money under Section 513, L. O. L., as amended by Laws of 1913, page 57, is an interlocutory matter, and is to be made only before decree and not afterward; and, where the Circuit Court awarded defendant wife $500 for such purpose *pendente lite*, the award exhausted the original jurisdiction on the subject. (Hengen v. Hengen, 155.)

Divorce—Appeal—Order Granting Suit Money.

3. The granting of suit money to a wife sued for divorce might be reviewed on appeal from the decree like any other question involved. (Hengen v. Hengen, 155.)

Divorce—Cash Awards to Wife—Statutes.

4. Cash awards to a wife sued for divorce are controlled by legislation. (Hengen v. Hengen, 155.)

Divorce—Alimony—Cash Award—Statute.

5. Under Section 513, L. O. L., as amended by Laws of 1913, page 57, providing that whenever a marriage shall be declared void or dissolved the court shall have power to decree, against the party in fault, such an amount of money in gross or in installments as may be proper for such party to contribute to the other's maintenance, the cash award to a wife sued for divorce to be made in final decree

is dependent upon the dissolution of the marriage, or the declaration that it is void; no alimony can be granted unless the marriage is dissolved or annulled, and even then the recovery must be from the party in fault. (Hengen v. Hengen, 155.)

Divorce—Grounds—Incompatibility of Temper.

6. Incompatibility of temper is not ground for divorce under the laws of Oregon. (Hengen v. Hengen, 155.)

Divorce—Grounds—Statute.

7. Divorce can be granted only for reasons specified in Section 507, L. O. L. (Leefield v. Leefield, 287.)

DUE INFLUENCE.

See Contracts, 3.

EASEMENTS.

Easements—Sidewalk—Establishment by User.

1. Where the use of a sidewalk was permissive in its origin, it could not become adverse without some unequivocal assertion of the rights of the public inconsistent with the title of the record owner. (City of Clatskanie v. McDonald, 670.)

ELECTION.

Requiring Election Between Defenses, When Harmless.

See Appeal and Error, 24.

Election Between Defenses.

See Pleading, 5, 6.

ELECTIONS.

Elections—Primary Election—Nature—Primary Elections.

1. Under the direct provisions of Section 3350, L. O. L., a primary election affords electors opportunity to express their choice of one or more candidates for an office to be voted for at an ensuing election. (Bethune v. Funk, 246.)

Elections—"General Election."

2. A general election is one that regularly recurs in each election precinct of the state on a day designated by law for the selection of officers, or is held in such entire territory pursuant to an enactment specifying a single day for the ratification or rejection of one or more measures submitted to the people by the legislative assembly, and not for the election of any officer. (Bethune v. Funk, 246.)

Elections—"General Election"—What Constitutes.

3. An election for ratifying legislative enactments is a general election within Section 3322, L. O. L., as amended by Laws of 1917, Chapter 330, providing that, where a general election for both county and city is held on the same day, election clerks shall receive only one fee, although one of the measures submitted (Laws 1917, c. 422 § 1), pursuant to a phrase in Article IV, Section 1, of the Constitution, referred to such election as special. (Bethune v. Funk, 246.)

See Municipal Corporations, 18.

EMPLOYERS' LIABILITY ACT.

See Master and Servant, 10.
See Trial, 5.

ENACTING CLAUSES.

See Municipal Corporations, 14, 16, 18, 19.
See Statutes, 3.

ESTOPPEL.

Estoppel—Title to Land—Proof.

1. The title to real property cannot be divested by estoppel, without clear and satisfactory evidence. (City of Clatskanie v. McDonald, 670.)

See Contracts, 7.
See Dedication, 7, 12, 13.
See Statute of Frauds, 2.

EVIDENCE.

Evidence—Charging Principal on Simple Contract—Parol Evidence.

1. Parol evidence is admissible to charge a principal on a simple contract not negotiable where the agent's name appears as principal, also to show the contract was executed with intent to bind the principal or for him. (Alvord v. Banfield, 49.)

Evidence—Declarations of Decedent—Statute.

2. Such testimony was admissible under Section 710, L. O. L., providing that the declaration, act or omission of a deceased person, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest. (Tharp v. Jackson, 78.)

Evidence—Presumptions—Failure to Produce Witness.

3. In an action on a policy of indemnity insurance to recover the amount of loss sustained and paid in satisfaction of a judgment in favor of an injured employee by delivery of a note, where it appeared that the defendant knew of the whereabouts of such employee, it is not in a position to claim that the failure of the employee to appear as a witness for plaintiff argues bad faith. (Riner v. Southwestern Surety Ins. Co., 293.)

Evidence—Judicial Notice—Expectancy of Life.

4. Without offering in evidence accepted standards of mortality tables to show the expectancy of life, a court will take judicial notice of the average duration of the life of a healthy person of the age of one whose death is under consideration. (Askay v. Maloney, 333.)

Evidence—Replevin—Value of Property—Presumption—Burden of Proof—Statute.

5. In an action to recover possession of sawmill machinery exchanged for lumber by plaintiff with defendant's mortgagor under an agreement that the machinery was worth $500, the presumption of continuance, prescribed by Section 799, subdivision 33, L. O. L., afforded *prima facie* evidence of the value of the property at the time

of the trial, imposing on defendant the burden of disproving such value, and, though plaintiff did not give testimony as to the value of the machinery, nonsuit was properly refused. (Maxson v. Ashland Iron Works, 345.)

Evidence—Parol Evidence Affecting Writing—Statute.

6. Under Section 713, L. O. L., providing that where the terms of an agreement have been reduced to writing, there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, with two exceptions, in an action to recover possession of sawmill machinery by plaintiff who exchanged it for lumber with defendant's mortgagor, evidence proving the intent of plaintiff and defendant's mortgagor, in respect to the writing between them, the execution of which plaintiff claimed resulted from the mistake of the scrivener was inadmissible. (Maxson v. Ashland Iron Works, 345.)

Evidence—Contract of Undisclosed Principal—Parol Evidence.

7. Parol evidence is admissible to charge a principal on a simple contract, not negotiable, wherein the agent appears as principal, and to show that the contract was executed for the principal with intent to bind him, though signed by the agent alone. (Smith v. Campbell, 420.)

Evidence—Admissions—Mortgagee.

8. Although default by mortgager in a suit to foreclose is an admission on the part of the mortgagor of fraudulent intent to defraud or delay collection by a judgment creditor, it does not bind the mortgagee. (Dempsey v. Ball, 560.)

See Animals, 1.
See Appeal and Error, 14.
See Attorney and Client, 1.
See Contracts, 8.
See Criminal Law, 1.
See Dedication, 1, 11, 12.
See Executors and Administrators, 1–4.
See False Pretenses, 2.
See Fraudulent Conveyances, 2.
See Indictment and Information, 1.
See Insurance, 2, 3, 7.
See Intoxicating Liquors, 3.
See Landlord and Tenant, 12.
See Logs and Logging, 3, 6, 7.
See Marriage, 2.
See Municipal Corporations, 12.
See Principal and Agent, 4, 5.
See Taxation, 1.
See Trial, 15, 16.

Admission of Incompetent Testimony.

See Appeal and Error, 17.

EXCEPTIONS, BILL OF.

See Appeal and Error, 21.

EXECUTORS AND ADMINISTRATORS.

Executors and Administrators—Action on Quantum Meruit—Evidence.

1. In an action on a *quantum meruit* for services rendered a decedent as stenographer, testimony that an agreement was made between the decedent and plaintiff whereby he agreed to pay her $50 a month for her services, the entire payment to be made five years after she entered his service, was admissible as material to the measurement of damages. (Tharp v. Jackson, 78.)

Executors and Administrators—Action for Services—Evidence.

2. In the absence of evidence that all business transactions at decedent's office were noted on certain calendars for the years 1909 to 1913, inclusive, the calendars, on which decedent had made notations of the business transacted in his office from day to day, there being many days on which no notations were made, had no tendency to prove the small volume of work done at the office, and were properly excluded. (Tharp v. Jackson, 78.)

Executors and Administrators—Action on Quantum Meruit—Evidence as to Value of Services.

3. In an action on a *quantum meruit* against decedent's administratrix for services rendered decedent as stenographer, though evidence of a contract between plaintiff and decedent was admissible, the agreement was not indispensable to recovery by plaintiff, and plaintiff was entitled to have the jury consider other testimony bearing on the reasonable value of her services. (Tharp v. Jackson, 78.)

Executors and Administrators—Rendition of Services—Sufficiency of Evidence.

4. In a stenographer's action against an administratrix for services rendered decedent, evidence *held* sufficient to sustain verdict for plaintiff. (Tharp v. Jackson, 78.)

Executors and Administrators—Action on Claim—Condition Precedent—Presentation.

5. An action at law on a claim against an estate must be based on the same claim as that presented to deceased's personal representative. (Tharp v. Jackson, 78.)

Executors and Administrators—Action on Claim—Previous Presentation.

6. Where plaintiff's action against an estate for personal services was for the same amount and services as her claim presented to the administratrix, it was not defeated by the fact that evidence on which she relied was not stated in the claim. (Tharp v. Jackson, 78.)

Executors and Administrators—Actions—Costs.

7. Where a proceeding and a suit by executors for a construction of the will of their testator were brought in an honest endeavor to properly administer the estate according to a legal construction of the will, the costs should be borne by the estate as other expenses of administration. (In re Wilson's Estate, 604.)

See Courts, 1.

EXECUTORY TRUSTS.

See Trusts.

EXPECTANCY OF LIFE.

See Evidence, 4.

FALSE PRETENSES.

False Pretenses—Indictment—Description of False Token.

1. On trial for obtaining money by false pretenses, under Section 1964, L. O. L., by procuring another to sell note secured by mortgage on real estate to which mortgagor did not have title, evidence that defendant tampered with abstract so as to make it appear he did have it must be disregarded where indictment does not mention abstract. (State v. Keep, 265.)

False Pretenses—Sufficiency of Evidence.

2. Evidence that payee of note which defendant procured to be executed and delivered to him, and which was secured by mortgage on real estate to which mortgagor had no title, without authority from or knowledge of defendant induced another by fraudulent representations to buy it, retaining the proceeds, is insufficient to sustain conviction for obtaining money by false pretenses. (State v. Keep, 265.)

False Pretenses—Indictment—Variance.

3. Obtaining of money by false pretenses cannot, under Section 1541, L. O. L., be proven by oral representations accompanying use of false token, where latter is not pleaded in the indictment, but only by some note or memorandum of false pretense in writing, either subscribed by or in the handwriting of defendant. (State v. Keep, 265.)

FINDINGS.

See Appeal and Error, 14.
See Trial, 9, 13, 14.

FISH-TRAPS.

See Navigable Waters, 2, 3.

FIXTURES.

Fixtures—Removal.

1. Personal property is not so attached to realty as to become a fixture if it can be removed without material injury to the property or to the freehold. (Maxson v. Ashland Iron Works, 345.)

Fixtures—Realty.

2. In an action to recover sawmill machinery by plaintiff, who sold it to defendant's mortgagor, defendant's title being derived from foreclosure of a chattel mortgage, no question could arise as to fixtures; defendant's right to the machinery being unconnected with any realty. (Maxson v. Ashland Iron Works, 345.)

FORECLOSURE.

See Evidence, 8.
See Mechanics' Liens, 1, 2, 4, 5.
See Vendor and Purchaser, 3, 5.

FOREIGN STATUTES.

Necessity for Pleading.

See Statutes, 1.

FORFEITURE.

See Contracts, 9–11.
See Logs and Logging, 8.

FORMER CONVICTION.

See Criminal Law, 11.

FRAUD.

Fraud—Presumption.

1. Fraud is never presumed, but must be pleaded and proved. (Benson v. Johnson, 677.)

See Contracts, 8.
See Logs and Logging, 3–8.
See Vendor and Purchaser, 7–10.

Actual Fraud.

See Corporations, 5.

FRAUDS, STATUTE OF.

See Statute of Frauds.

FRAUDULENT CONVEYANCES.

Fraudulent Conveyances—Pending Suit—Intent—Knowledge.

1. In an action involving a mortgage executed pending a suit for damages, evidence *held* not to show that the mortgagee had knowledge or notice of a fraudulent intent of the mortgagor to defraud or delay collection of the possible damages. (Dempsey v. Ball, 560.)

Fraudulent Conveyances—Evidence—Presumptions.

2. Fraud against a mortgagor's creditors is not presumed, but must be shown by satisfactory evidence which may be circumstantial. (Dempsey v. Ball, 560.)

Fraudulent Conveyances—Necessity of Pleading—Bulk Sales Law.

3. The Bulk Sales Law (L. O. L. §§ 6069–6072), as amended by Laws of 1913, page 537, must be pleaded by the creditor who would avail himself of it, since it merely attaches to vendor's conduct a conclusive presumption that the transfer is fraudulent as to any and all creditors of vendor, and gives them a right which they may assert or ignore, and the law has the effect of creating a statutory fraud, necessary to be pleaded. (Benson v. Johnson, 677.)

Fraudulent Conveyances—Bulk Sales Law—Effect.

4. Failure to comply with the Bulk Sales Law as amended does not affect validity of the transfer as between the parties, but only as against creditors. (Benson v. Johnson, 677.)

Fraudulent Conveyances—Pleading—Issues and Proof—Bulk Sales Law.

5. Where compliance with the Bulk Sales Law as amended was not pleaded, it could not be proved by cross-examination of the defendant. (Benson v. Johnson, 677.)

FRONT-FOOT RULE.

See Municipal Corporations, 38.

GENERAL DENIAL.

See Pleading, 2.
See Replevin, 2.

HARMLESS ERROR.

See Appeal and Error, 13, 19, 24.
See Criminal Law, 1.

HAZARDOUS OCCUPATION.

See Master and Servant, 16, 17.

HOMESTEAD.

Homestead—Claim of Homestead.

1. Section 221, L. O. L., providing that the homestead of any family shall be exempt from judicial sale for the satisfaction of any judgment hereafter obtained, does not impair a mechanic's lien upon the homestead premises, but merely suspends its execution if the owner of the homestead claims the exemption. (Johnson v. Tucker, 645.)

HUSBAND AND WIFE.

Husband and Wife—Loss of Consortium—Right of Action.

1. The enabling statute has not abridged the common-law right of a husband to the companionship, love and services of his wife, comprehended in the term "consortium," and his accompanying right to sue for loss thereof through her personal injury negligently inflicted by another. (Elling v. Blake-McFall Co., 91.)

IMPROVEMENTS.

See Municipal Corporations, 24, 35, 37, 40–45.

Compensation for Improvements Made by Mortgagee.

See Mortgages, 1, 4.

INDEMNITY.

See Insurance, 1–6.

INDEPENDENT CONTRACTOR.

See Master and Servant, 8.

INDIANS.

Indians—Lease by Allottee—Approval—"Condition Precedent."

1. A provision in a lease by an Indian allottee that it should become binding only after approval by the Indian reservation superintendent, or Secretary of the Interior, is a "condition precedent." (Rogers v. Maloney, 61.)

Indians—Lease—Approval—Conditions Precedent—Waiver.

2. Where a lease by an Indian allottee provided that it should not become effective until approved, evidence that the lessee advanced the lessor money, furnished supplies, and did some work on the property, all in reliance upon the lease, makes the lessor's waiver of the condition regarding approval, etc., a jury question. (Rogers v. Maloney, 61.)

INDICTMENT AND INFORMATION.

Indictment and Information—Evidence Admissible Under Plea—Nolle Prosequi—Proof of Agreement.

1. Under Section 1505, L. O. L., providing that all matters of fact tending to establish a defense to a charge in the indictment, other than plea of former conviction or acquittal, may be admitted under plea of not guilty, defendant may prove, under that plea to an indictment for obtaining money under false pretenses, agreement with district attorney of another county that if he pleaded guilty to crime of making a conveyance without title, which conveyance was a preparatory step toward obtaining money by false pretenses, all other prosecutions growing out of that transaction would be dismissed. (State v. Keep, 265.)

Indictment and Information—Illegal Sale of Liquor—Constitutional Requirement.

2. An indictment for illegally selling intoxicants, which, as permitted by Laws of 1915, page 166, Section 33, did not name the purchaser, was sufficient, and the indictment and statute did not violate Article I, Section 11, of the Constitution, declaring that accused shall have the right to demand the nature and cause of the accusation. (State v. Wilbur, 565.)

Indictment and Information—Constitutional Requirements—Intoxicating Liquors.

3. Laws of 1915, page 166, Section 33, known as the Prohibition Act, and providing that the indictment need not state the name of the person by whom or to whom the liquor was sold, does not violate the Sixth Amendment of the United States Constitution, providing that the accused shall be informed of the nature of the cause of the accusation. (State v. Wilbur, 565.)

See Criminal Law, 4–10.
See False Pretenses, 1, 3.

INITIATIVE AND REFERENDUM.

See Municipal Corporations, 20–22.

INSTRUCTIONS.

See Appeal and Error, 13.
See Contracts, 6.
See Damages, 8.
See Master and Servant, 1, 4, 12, 23.
See Trial, 1, 5–8, 15–17.
See Vendor and Purchaser, 11.

Necessity for Request.

See Appeal and Error, 3, 5.

When Error to Refuse to Instruct.

See Criminal Law, 3.

Refusal of Request Excluding Evidence.

See Trial, 2.

Refusal of Request Covered by Charge.

See Trial, 3.

INSURANCE.

Insurance—Indemnity Insurance—Bad Faith.

1. Where an indemnity insurance policy provided that no action shall lie against the company for any loss or expense under the policy unless for loss or expense actually paid in satisfaction of a final judgment within 90 days from the date of the judgment and after trial of the issue, actual satisfaction of a judgment by the delivery and acceptance of a note did not amount to bad faith, although the insured and his attorneys knew that their satisfaction of the judgment would enable them to compel the insurance company to pay the amount of the judgment. (Riner v. Southwestern Surety Ins. Co., 293.)

Insurance—Indemnity Insurance—Satisfaction of Judgment—Evidence —Sufficiency.

2. In an action on a policy of indemnity insurance to recover the amount of a loss sustained and paid in satisfaction of a judgment in favor of an injured employee in which it appeared that the judgment was satisfied by the delivery and acceptance of a note, evidence *held* to show that the judgment was in truth satisfied, and that the note was actually given and accepted in payment of the judgment, and that it was clearly intended and understood that the note extinguished the judgment, and that the parties acted in good faith without any agreement that any step in the transaction should be considered in any way different from its outward appearance. (Riner v. Southwestern Surety Ins. Co., 293.)

Insurance—Indemnity Insurance—Satisfaction of Judgment—Evidence —Sufficiency.

3. In an action on a policy of indemnity insurance to recover loss sustained and paid in satisfaction of a judgment in favor of an injured employee by the delivery of a note, in which it appeared that the judgment was satisfied of record, evidence *held* to show that the parties agreed that the note should extinguish the judgment. (Riner v. Southwestern Surety Ins. Co., 293.)

Insurance—Indemnity Insurance—"Loss Actually Sustained."

4. The giving of a note in satisfaction of a judgment in an employee's action for injuries amounts to a loss actually sustained by the employer within the meaning of a provision of an indemnity insurance policy providing that no action shall be allowed against the insurance company for any loss or expense under the policy unless it shall be brought for loss or expense actually sustained and paid in satisfaction of a final judgment, etc. (Riner v. Southwestern Surety Ins. Co., 293.)

Insurance—Indemnity—Personal Injury—Liability.

5. Insurer *held* not liable on an accident indemnity policy for injury of plaintiff's employee in elevator accident; the accident occurring while the employee was engaged in boarding up the shaft, and not while he was in the car, or in the elevator-well or hoistway, or while entering or alighting from the car, for which accidents alone the contract provided indemnity, and the elevator being in use, during the progress of such work, contrary to policy provisions. (Western W. Co. v. New Amsterdam C. Co., 597.)

Insurance—Indemnity—Personal Injury—Burden of Proof.

6. In action on an accident indemnity policy, it was incumbent on plaintiff to prove that the injury to his employee came within the policy terms; the defendant being entitled to rebut this by cross-examination. (Western W. Co. v. New Amsterdam C. Co., 597.)

Insurance—Action on Policy—Sufficiency of Evidence.

7. Before plaintiffs are entitled to judgment on a policy they have to show the amount of loss sustained. (McKern v. The Corp. of the Royal Exchange Assurance, 652.)

Insurance—Marine Insurance—Cause of Loss.

8. Under a policy insuring against the perils of the waters, it was incumbent on plaintiffs to show that the sinking of the boat was caused by the perils insured against. (McKern v. The Corp. of the Royal Exchange Assurance, 652.)

Insurance—Marine Insurance—Presumption and Burden of Proof.

9. If there is evidence showing that a vessel was lost or damaged on encountering some peril insured against, the presumption is that the vessel was seaworthy, and the burden rests upon the insurer to show the contrary. (McKern v. The Corp. of the Royal Exchange Assurance, 652.)

Insurance—Marine Insurance—Presumption and Burden of Proof.

10. When a loss occurs which cannot be ascribed to stress of weather, or to any accident which might possibly have produced it, the presumption is that the vessel was defective and not seaworthy, and the burden of proving otherwise is on the insured. (McKern v. The Corp. of the Royal Exchange Assurance, 652.)

INTENT.

See Damages, 1.
See Dedication, 4–6.
See Evidence, 8.
See Fraudulent Conveyances, 1.

INTOXICATING LIQUORS.

Intoxicating Liquors—Prohibition Statute—Construction—"Manufacture."

1. One who presses juice from grapes, puts it in a vat and permits it to ferment by natural process with intent to use part of it in the state as a beverage for himself and family, manufactures wine in violation of Gen. Laws, 1915, page 150. (State v. Marastoni, 37.)

Intoxicating Liquors—Prohibition Statute—"Manufacture."

2. Where "manufacture," as used in Gen. Laws 1915, page 151, Section 5, means to make, irrespective of quantity produced or use to which it is to be put. (State v. Marastoni, 37.)

Intoxicating Liquors—Criminal Prosecution—Sufficiency of Evidence.

3. In a nuisance prosecution for selling intoxicating liquors, testimony of a so-called informer employed for the express purpose of procuring evidence, who was corroborated to some extent, warrants a conviction. (State v. Hoffman, 276.)

Intoxicating Liquors—Criminal Prosecution—Return of Seized Liquors.

4. Under Laws of 1915, page 150, providing for one complaint and warrant upon which are based distinct proceedings for maintaining a nuisance and a proceeding *in rem* against the seized liquors, the court cannot order the seized liquors returned to defendant upon his acquittal on the nuisance charge. (State v. Hoffman, 276.)

Intoxicating Liquors—Illegal Sale by Agent—Consent of Defendant—Statute.

5. Under Laws of 1913, page 410, providing that in all prosecutions for an alleged illegal sale of intoxicants it is not necessary to show the knowledge of the principal to convict him for the acts of his agent or servant, unrepealed by Laws of 1915, page 170, Section 41, relating to intoxicants, and repealing only such prior enactments as were in conflict, in a prosecution for illegally selling intoxicants, the court properly charged that defendant was guilty if the sale was actually made by his employee, even if without his consent. (State v. Wilbur, 565.)

See Constitutional Law, 5.
See Indictment and Information, 3.

Prohibiting Manufacture.

See Constitutional Law, 1.

JOINT TORT-FEASORS.

See Appeal and Error, 22.
See Trial, 11, 12.

JUDGMENT.

Judgment—Motion to Vacate—Affidavit for Service of Summons by Publication—Showing of Merits by Answer or Objections—Necessity for.

1. Where the affidavit of publication was not denied, and was in strict conformity with Section 58, L. O. L., a motion to vacate the de-

fault judgment on the ground that the paper in which the summons was published was not of such general circulation as prescribed by law was properly denied, where there was no affidavit supporting the motion or absolute showing of merits and no answer or other objection to the justice of the judgment. (Oregon Inv. & Mtg. Co. v. Keller, 262.)

Power of Court to Set Aside Judgment.

See New Trial, 2, 3.

JUDICIAL NOTICE.

See Evidence, 4.

JURISDICTION.

See Courts, 1.
See Criminal Law, 2.

JURY.

Jury—Qualifications—Credibility of Witnesses.

1. In a nuisance prosecution for selling intoxicating liquors, the state cannot question prospective jurors regarding their prejudice against the testimony of witnesses obtaining information solely for purposes of prosecution. (State v. Hoffman, 276.)

Jury—Examination of Jurors.

2. Where a corporate bonding company was a proper party defendant, it was not error to permit persons called as jurors to state, over objection and exceptions, upon their *voir dire*, that they were not, and never had been, interested in indemnity security companies. (Askay v. Maloney, 333.)

KNOWLEDGE.

See Attorney and Client, 3.
See Fraudulent Conveyances, 1.

LABOR.

See Work and Labor.

LACHES.

See Municipal Corporations, 34.

LANDLORD AND TENANT.

Landlord and Tenant—Termination of Lease—Liability for Rent.

1. When the lessor terminated a lease, the lessee's liability to pay rent accruing thereafter was extinguished. (Alvord v. Banfield, 49.)

Landlord and Tenant—Termination of Lease—Covenants.

2. When the relations of landlord and tenant are at an end, and the lessee has surrendered and the landlord accepted the premises, thus putting an end to the lease, so far as the rights of the parties are concerned, all covenants in favor of either are terminated at once, where no cause of action has accrued or matured during the life of the lease. (Alvord v. Banfield, 49.)

Landlord and Tenant—Surrender and Acceptance—Cause of Action for Diminished Rent.

3. In the absence of express covenant to the contrary, a landlord, after accepting a surrender of the premises, has no cause of action for damages against his former tenant by reason of diminished rent paid thereafter. (Alvord v. Banfield, 49.)

Landlord and Tenant—Recovery of Deposit—Pleading.

4. In an action by the trustees in bankruptcy of a corporate lessee to recover a security deposit from the landlord, the complaint, alleging that a person executed the lease in his own name, as "and for" the agent of the corporate lessee, was not subject to demurrer, though its rhetoric was not perfect, in the absence of any denial of the facts asserted or other appropriate defense, particularly when considered with the averment that the lessee paid the money as a security deposit, showing the lease was executed in the transaction of the company's business. (Alvord v. Banfield, 49.)

Landlord and Tenant—Tenant's Action to Recover Deposit—Pleading —"Assume."

5. The complaint, which alleged that defendant, to whom the leased premises were sold subject to the lease, "assumed all the lessor's obligations thereunder, including the obligation of the original lessor with reference to the repayment of the deposit in said lease provided for," showed that defendant agreed to perform the conditions of the lease as to the deposit; "assume" meaning, in matters of law, to take upon oneself. (Alvord v. Banfield, 49.)

Landlord and Tenant—Crop Lease—Rights of Parties.

6. Where the land owner leases the land on a crop share rental, he and the lessee are tenants in common after the crop is harvested, and such relationship is not necessarily inconsistent with the relation of landlord and tenant. (Halsey v. Simmons, 324.)

Landlord and Tenant—Assignment of Lease—Effect.

7. The liability of the assignee of the lessee arises out of privity of estate, and not of contract, and is confined to such covenants in the lease as run with the land. (First Nat. Bank v. Hazelwood Co., 403.)

Landlord and Tenant—Assignment of Lease—Effect.

8. Under a lease of a creamery with which the parties attempted to include certain milk routes, covenants to keep up the milk routes did not run with the land and did not bind the assignee of the lessee. (First Nat. Bank v. Hazelwood Co., 403.)

Landlord and Tenant—Assignment of Lease—Effect.

9. A covenant that the lessee would operate the leased creamery plant as an independent creamery concerns the use to be made of the premises and runs with the land. (First Nat. Bank v. Hazelwood Co., 403.)

Landlord and Tenant—Assignment of Lease—Breach of Covenant—Damages.

10. Where the lessee of a creamery convenanted to keep up cream routes and to operate the premises as an independent creamery and damages by diminishing rental value of the premises were alleged

due to his failure to operate as an independent creamery, but the witnesses ascribed the damage to the loss of the cream routes, the lessor could not recover from the lessee's assignee. (First Nat. Bank v. Hazelwood Co., 403.)

Landlord and Tenant—Injury to Property—Liability.

11. Where the lessee's assignee had possession of personalty connected with the premises, he was liable to account for it as bailee, or for its value when lost or converted. (First Nat. Bank v. Hazelwood Co., 403.)

Landlord and Tenant—Personalty Connected With Premises—Loss—Damage—Evidence.

12. Where a lessee's assignee had possession of personalty connected with the leased premises and the same was lost, the value of the property at the inception of the lease was relevant in fixing the damage, which was the value of the property when lost. (First Nat. Bank v. Hazelwood Co., 403.)

LARCENY.

See Animals, 1.

LEASE.

See Bankruptcy, 1.
See Damages, 5.
See Indians, 1, 2.
See Landlord and Tenant, 1–6.

Assignment of Lease.

See Landlord and Tenant, 7–10.

Modification of Lease by Parol.

See Statute of Frauds, 1, 2.

LIABILITY.

See Landlord and Tenant, 11, 12.
See Insurance, 5.

LIBEL AND SLANDER.

Libel and Slander—Disparagement of Property of Another—Slandering Business.

1. Language which does no more than to disparage the property of another or the quality of the articles which he manufactures or sells is not actionable unless special damages are alleged and proved; but, if the language disparaging the property of another also involves an imputation upon him in respect to his trade, business, or profession, then the language becomes actionable *per se*, and it is unnecessary to allege or prove special damages. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Business.

2. Words to be actionable as slandering a person's business must touch the person in his business, and must impeach either his skill or knowledge, or attack his conduct therein. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Business—Sale of Land.

3. Assuming that plaintiff's attempt to sell a tract of land was a business, a statement of another that they had no right to sell it was not actionable as a slander of such business, because the statement did not impute dishonesty or deceitfulness, or that they lacked capacity or skill, or that they were violating any law in pursuit of the alleged business. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Title—Option Holders.

4. Option holders, although not owning the land, have such an interest as entitles them to damages from any person slandering their title. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Title—Option Holders.

5. If the owner of land falsely and maliciously stated that his contract of option to plaintiffs had expired and that they had no rights thereunder and no right to engage in selling and disposing of the land, he was guilty of slandering plaintiff's title. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Title—Special Damages.

6. Plaintiff in action for damages for slander of title must allege and prove special damages, and it is not enough merely to allege generally that he intended to sell to any person who might buy, but he must allege and prove the loss of sale to some particular person; the loss of sale to some particular person being the special damage and the gist of the action. (Hubbard v. Scott, 1.)

Libel and Slander—Slander of Title—Damages.

7. In action by option holders against the owner giving the option for slander of their option title by a statement that the option had terminated, plaintiffs could not recover expense of attorney's fees in defense of a prior suit by the owner to forfeit the option; for, although the fees fixed by statute and technically known as costs did not furnish full compensation, the decree awarded in the prior suit is supposed to have adjudged to the prevailing parties all sums to which they were entitled for expenses therein incurred. (Hubbard v. Scott, 1.)

LIENS.

Recording of Lien Notice.

See Mechanics' Liens, 1, 2.

Failure to Enforce Payment for Improvements is not Waiver of Lien on Property.

See Municipal Corporations, 28.

Foreclosure of Vendee's Lien.

See Vendor and Purchaser, 3, 5.

LIMITATION OF ACTIONS.

Limitation of Actions—Statute of Limitations—Deferred Payment.

1. Where a stenographer agreed to work for decedent for $50 a month, payable at the end of five years, the payment did not become

due until such time, and the statute of limitations did not run on the stenographer's cause of action until six years thereafter. (Tharp v. Jackson, 78.)

Limitation of Actions—Statute of Limitations—Initiation of Period—Attorney's Cause of Action.

2. Where an attorney, pursuant to his contract to contest assessments for paving in the City of Portland for a contingent fee of a third saved property owners on the original amount charged against their property, brought suit and obtained decree setting aside the first assessment, which decree was entered June 28, 1907, and, under Portland Charter of 1903, Sections 400, 401, the city had the right to make a reassessment of the cost of the improvement within ten years of the passage of the resolution of intention for the making of the original work, the statute of limitations began to run against the attorney's claim for compensation against his clients April 3, 1913, when the city's time for reassessment expired, and did not begin to run on rendition of the decree. (Duniway v. Wiley, 86.)

LIQUIDATED DAMAGES.

Liquidated Damages or Penalty.

See Damages, 1–5.

LITTORAL RIGHTS.

See Navigable Waters, 2, 3.

LOGS AND LOGGING.

Logs and Logging—Agreement to Saw—Sale of Standing Timber.

1. An agreement to saw timber is not governed by the rule as to the sale of standing timber. (Smith v. Campbell, 420.)

Logs and Logging—Contracts to Saw Timber—Consideration.

2. Where plaintiff agreed to saw timber on defendant's land for so much a cord, defendant to retain title to the saw outfit furnished plaintiff until the full price was paid by deductions from the price payable to plaintiff for his work, the contract was supported by sufficient consideration. (Smith v. Campbell, 420.)

Logs and Logging—Sales of Timber—Rescission—Evidence.

3. In a suit to rescind a contract for the sale of timber, evidence *held* insufficient to show that defendants intentionally misrepresented the amount of timber on the tracts involved. (Stennick v. J. K. Lumber Co., 444.)

Logs and Logging—Sale of Timber—Misrepresentations—Effect of Writing.

4. That an alleged misrepresentation as to the quality of timber involved in a contract was written into the contract does not add to its efficacy or make it fraudulent. (Stennick v. J. K. Lumber Co., 444.)

Logs and Logging—Sales of Timber—Validity of Contract—Fraud.

5. In order to have a rescission of a sale of timber for fraud, plaintiff must show that defendants made a material representation;

that it was false; that when they made it they either knew it was false or made it recklessly without knowledge of its truth, as a positive assertion; that it was made with intent that it should be acted upon by the opposite party; that such party did act in reliance upon it and suffered injury. (Stennick v. J. K. Lumber Co., 444.)

Logs and Logging—Sales of Timber—Rescission of Contract—Evidence.

6. In a suit to rescind a sale of timber, evidence *held* to show that representations made by defendants as to the quantity of timber were in fact false. (Stennick v. J. K. Lumber Co., 444.)

Logs and Logging—Sales of Timber—Rescission of Contract—Evidence.

7. In a suit to set aside a sale of timber for fraud, evidence *held* insufficient to show that defendants promised the other contracting party a quarter interest in a corporation to be formed. (Stennick v. J. K. Lumber Co., 444.)

Logs and Logging—Contracts—Forfeiture—Enforcement.

8. Where a contract relating to timber provides that in case of default by one of the parties his property and interest in the contract shall forthwith become the property of defendants who hold the legal title to the land, if the language of the agreement shows an intent of the parties to prescribe a forfeiture, and there has been a default, unless it is occasioned by the inequitable conduct of the defendants, the forfeiture must be enforced. (Stennick v. J. K. Lumber Co., 444.)

MANDAMUS.

Mandamus—Judicial Acts—Preservation of Homestead.

1. Plaintiffs sued to foreclose a mechanic's lien. They secured decree, and execution was placed in the hands of the sheriff. The owner sued to enjoin the sheriff from selling the property on the ground that it was her homestead which she had claimed by due notice under Section 224, L. O. L. Injunction was granted. Plaintiffs then applied for *mandamus* to compel revocation of the injunction and levy of the execution. *Held*, that as the judges had authority judicially to hear and determine the suit instituted to preserve the homestead, and as under Section 613, L. O. L., *mandamus* does not control judicial discretion, the writ could not be granted. (Johnson v. Tucker, 645.)

Mandamus—Function of Writ.

2. In such case, *held* that *mandamus* could not issue against the sheriff to compel the execution, since if he wrongfully refused to levy it, plaintiffs had a remedy upon their bond. (Johnson v. Tucker, 645.)

MARINE INSURANCE.

See Insurance, 8–10.

MARRIAGE.

Marriage—Annulment—Mental Incapacity.

1. To warrant annulment of a marriage contract for mental incapacity as provided by Section 503, L. O. L., there must have been

that mental incapacity insufficient to comprehend the nature of the business and to understand its quality and consequences, as required to avoid other contracts; marriage being recognized as a civil contract by Section 7016. (Coleman v. Coleman, 99.)

Marriage—Annulment—Sufficiency of Evidence.

2. Evidence *held* insufficient to establish mental incompetency and undue influence sufficient to avoid a marriage contract and conveyance of property incidental thereto, between inmates of a home for the aged, aged 79 and 73 years. (Coleman v. Coleman, 99.)

Marriage—Persons Who may Marry—Consanguinity.

3. Marriage between first cousins consummated outside the state of residence for the purpose of evading its laws will not be annulled in this state, regardless of whether it was unlawful in state where consummated, notwithstanding Section 7017, L. O. L., prohibiting such marriage, Section 2098, declaring it punishable by imprisonment or fine, and Section 502, declaring it void if solemnized within the state, since latter section is impliedly to the effect that, if a marriage between prohibited persons is solemnized in another state, the marriage is valid in this state irrespective of whether or not it is of any binding force in state where nuptial is celebrated. (Leefield v. Leefield, 287.)

MASTER AND SERVANT.

Master and Servant—Collision of Autos—Injury to Guest—Contributory Negligence—Duty to Remonstrate or Warn—Instruction.

1. Instruction in action by one injured by collision of defendant's auto with that of one with whom plaintiff was riding as guest that, if plaintiff had reason to suspect carelessness or incompetency of the driver, it was his duty to remonstrate with or caution him against being careless, or to caution him concerning the operation of the car, and if he was running it at a dangerous rate of speed, and plaintiff knew of the rate and its danger, or in the exercise of reasonable prudence ought to have known and appreciated it, it was his duty to remonstrate against it and direct the driver to slacken it, and if he knew and appreciated the danger of a collision in time to avert it by promptly warning the driver, it was his duty to do so, substantially states the law. (Elling v. Blake-McFall Co., 91.)

Master and Servant—Third Person's Injury—Automobile Accident—Presumption.

2. Where plaintiff proves that the vehicle which caused his injury belonged to defendant, the jury may infer that the driver was defendant's servant, and that the vehicle was being used for defendant's purposes. (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Automobile Accident—Relation—Question for Jury.

3. Evidence showing ownership and use of automobile causing plaintiff's injury *held* sufficient to submit to the jury the question of the driver's employment by defendant and use of car for defendant's purposes. (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Automobile Accident—Instructions.

4. Instructions that, if driver of automobile which injured plaintiff was in defendant's employ, and was then using the car in defendant's business, plaintiff could recover, *held* warranted by the testimony. (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Automobile Accident—Relation—"Servant."

5. If defendants selected the driver of automobile injuring plaintiff, had power to discharge him, and right to direct his work, the driver was then the defendant's "servant." (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Automobile Accident—Master's Liability.

6. If the driver of the automobile injuring plaintiff was defendant's servant, and was using the machine in defendant's business for the purpose of demonstrating the automobile for a prospective purchaser, the defendants were responsible for the driver's acts. (Houston v. Keats Auto Co., 125.)

Master and Servant—Principal and Agent—What Constitutes Relation—Wages.

7. The receipt of a stated wage is not essential to create the relation of principal and agent or master and servant. (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Independent Contractor.

8. Defendants would not be liable for plaintiff's injury from an automobile owned by them if the driver was an independent contractor, defendants retaining no control over him, and the work not being inherently dangerous. (Houston v. Keats Auto Co., 125.)

Master and Servant—Third Person's Injury—Effect of Contract on Liability.

9. Contractual relations between owners of automobile injuring plaintiff and the driver thereof could not relieve defendants from liability if the driver was in fact under their control and engaged in the transaction of their business. (Houston v. Keats Auto Co., 125.)

Master and Servant—Injuries to Servant—Assumption of Risk—Statute.

10. In actions for personal injuries coming within the scope of the Employers' Liability Act (Laws 1911, p. 16), the doctrine of assumption of risk by the employee is abrogated. (Tabor v. Coin Machine Mfg. Co., 194.)

Master and Servant—Contributory Negligence—Pleading.

11. In employee's action for injuries, the answer pleading that the injury was caused solely by the negligence of plaintiff, although not admitting dereliction upon the part of employer, was sufficient to raise the question of contributory negligence. (Tabor v. Coin Machine Mfg. Co., 194.)

Master and Servant—Injuries to Servant—Failure to Warn—Instruction.

12. Where the employee in an action for injuries alleged that punchpress was defective in that it would "repeat," the court correctly submitted question of failure of employer to warn as to dangerous character of machine, although the evidence showed that plaintiff had been warned of the dangerous nature of the work. (Tabor v. Coin Machine Mfg. Co., 194.)

Master and Servant—Workmen's Compensation—Award of Commission—Review.

13. The State Industrial Accident Commission not being a judicial tribunal, a re-examination of any of its final determinations by a Circuit Court is inaugurated by procedure in the nature of a writ of review, and when jurisdiction of the cause has thus been secured, it is to be tried *de novo* as upon an appeal. (Raney v. State Industrial Acc. Com., 199.)

Master and Servant—Workmen's Compensation—Award of Commission—Review.

14. Where a petition to review a refusal to award compensation is tried without a jury, the only question involved is whether the findings of fact as made by the court when supported by any evidence uphold the judgment rendered. (Raney v. State Industrial Acc. Com., 199.)

Master and Servant—Workmen's Compensation—Who Liable.

15. Where a person engaged in farming operates for himself or others any machine or agency that brings such employer automatically within the hazardous occupations, unless he has given in the manner prescribed notice that he will not be governed by the provisions of the act, he is not immune from making to the State Industrial Accident Commission the small contributions which the law exacts from the product of business of that kind in order to create a fund as a partial compensation to the laborers who have been injured by such means. (Raney v. State Industrial Acc. Com., 199.)

Master and Servant—Workmen's Compensation—Who Liable—"Hazardous Occupation."

16. Under Workmen's Compensation Act (Laws 1913, p. 192), Section 13, including mills within hazardous occupations, and Section 14, providing that "mill" means any plant, premises, room, or place where machinery is used, any process of machinery, changing, altering, or repairing any article or commodity for sale or otherwise, together with the yards and premises which are part of the plant, including elevators, warehouses, and bunkers, one employed by a farmer working on a silo-mill is engaged in a "hazardous occupation." (Raney v. State Industrial Acc. Com., 199.)

Master and Servant—Workmen's Compensation—Who Liable—Hazardous Occupation.

17. The fact that the operation of an ensilage cutter may have been merely incidental to farming in which the employer was generally engaged did not make the management of the mill a less "hazardous occupation." (Raney v. State Industrial Acc. Com., 199.)

Master and Servant—Pleading—Variance.

18. In an action to recover a fixed sum per month as wages for services as a farm laborer in raising hops, plaintiff must prove contract as alleged, and cannot recover where it appears that he was to be paid for his labor only out of the proceeds of the crop. (Gong v. Toy, 209.)

Master and Servant—Restoration of Unsafe Place—Assumption of Risk.

19. Where a railroad which purchased a small feeder line in inferior condition and was repairing it knew that a trestle beside which it was building a fill was in excessively unsafe condition, but its employee in the construction work riding on a hand-car did not know it, the employee was not required to examine the trestle to ascertain its condition, having a right to assume that the road would not send him across a dangerous trestle. (Emerson v. Portland E. & E. R. Co., 229.)

Master and Servant—Assumption of Risk—Obvious Danger—Question for Jury.

20. Whether the dangerous condition of the trestle was so open and obvious that the employee must have observed it, *held* for the jury as a question of fact. (Emerson v. Portland E. & E. R. Co., 229.)

Master and Servant—Safe Place to Work.

21. It is the duty of the master to furnish the employee a reasonably safe place to work, a duty performed when he has exercised reasonable diligence to do so. (Emerson v. Portland E. & E. R. Co., 229.)

Master and Servant—Safe Place to Work—"Reasonably Safe"—"Reasonable Safety."

22. The term "reasonably safe," used in relation to a master's duty to furnish safe tools and a safe place to work, implies such measure of safety as accords with common usage and practice in matters of a particular character; "reasonable safety" implies such a condition as ordinary care and diligence will secure. (Emerson v. Portland E. & E. R. Co., 229.)

Master and Servant—Injuries to Servant—Actions—Instructions.

23. In a servant's action for injuries, an instruction that, "if the work that the plaintiff engaged in was not work involving a risk or danger then any contributory negligence on the part of the plaintiff which contributed to approximately bring about the accident, then the plaintiff would not be entitled to recover anything on this action, provided of course that the contributory negligence of the plaintiff must have been in one or more of the respects as set forth in defendant's answer," was properly refused as tending to confuse the jury. (Quinn v. Hawley Pulp & Paper Co., 630.)

Master and Servant—Injuries to Servant—Safe Place to Work—Injury Avoidable by Master's Care.

24. If the process used by the employer was such as in fact to cause hurt to the employee when it was practicable to obviate the danger, its long continuance does not make the master less culpable. (Quinn v. Hawley Pulp & Paper Co., 630.)

MECHANICS' LIENS

Mechanics' Liens—Foreclosure—Recording of Notice.

1. Where copies of recorded lien notice claim attached to complaint in mechanic's lien foreclosure were not certified or authenticated or admitted to be true copies, they were insufficient to show recording of the lien notice. (Kelley v. Anderson, 138.)

Mechanics' Liens—Foreclosure—Matters to be Proved—Recording of Lien Notice.

2. The lien notice, as recorded, is the foundation of plaintiff's right to recover in a mechanic's lien foreclosure. (Kelley v. Anderson, 138.)

Mechanics' Liens—When Perfected—Effect of Filing.

3. Although a mechanic's lien takes its origin with the furnishing of labor or materials, it is not perfected until the notice or claim of lien is filed, whereupon it relates back to the beginning when the work commenced or the materials were furnished. (Johnson v. Tucker, 645.)

Mechanics' Liens—Necessity of Foreclosure.

4. A mechanic's lien must be foreclosed by suit in which a decree is rendered as in other suits. (Johnson v. Tucker, 645.)

Mechanics' Liens—Decree—Effect.

5. Decree of foreclosure of mechanic's lien is not different from others as to its effect upon property, and as there are no exceptions in the homestead laws in favor of such decree, it affects them in the same manner as other judgments or decrees. (Johnson v. Tucker, 645.)

Effect of Lien on Homestead.

See Homestead, 1.
See Mandamus, 1, 2.

MEDFORD, CHARTER OF.

See Colby v. City of Medford, 485.

MENTAL INCAPACITY.

See Marriage, 1.

MISJOINDER OF CAUSES.

Effect of Failure to Demur and Motion to Elect Withdrawn.

See Appeal and Error, 18.

Contract and Tort.

See Pleading, 4.

Waiver of Objections.

See Pleading, 1.

MODIFICATION.

See Statute of Frauds, 1, 2.

MORTGAGES.

Mortgages—Mortgagee in Possession—Compensation for Improvements.

1. Purchaser of an orchard at mortgage foreclosure sale cannot, after the debtor has redeemed the property, recover his expenses and the value of his services in attempting to eradicate pear blight from the orchard, since, under Section 248, L. O. L., as to manner of redemption, debtor is not required to pay such purchaser the moneys necessarily expended by him in preserving the estate from loss and injury. (Reichert v. Sooy-Smith, 251.)

Mortgages—Redemption—Use and Occupation.

2. Redemptor may recover of purchaser at foreclosure sale the reasonable value of the use and occupation of the premises during the time they were in his possession, without regard to what purchaser may have realized therefrom. (Reichert v. Sooy-Smith, 251.)

Mortgages—Use and Occupation—Setoff.

3. Purchaser of land at foreclosure sale may setoff against reasonable value of use and occupation of premises during time they were in his possession money spent in care and cultivation of property and in protecting it from deterioration, together with reasonable value of his own services in such work. (Reichert v. Sooy-Smith, 251.)

Mortgages—Mortgagee in Possession—Compensation for Improvements.

4. A purchaser of an orchard at mortgage foreclosure sale cannot, after redemption, recover of judgment debtor his expenses in cultivating it, under Section 249, L. O. L., which requires restoration of debtor to his estate on redemption, as there is no counterpart to this in the Code whereby purchaser may charge judgment debtor with disbursements in operating the premises. (Reichert v. Sooy-Smith, 251.)

Mortgages—Redemption—Use and Occupation.

5. Judgment debtor, on redemption, has no right of action against purchaser at mortgage foreclosure sale for mere use and occupation, but only for actual profit he has made out of the property through use: Section 251, L. O. L. (Reichert v. Sooy-Smith, 251.)

See Evidence, 8.
See Fraudulent Conveyances, 1, 2.

MOTION.

To Vacate Judgment on Insufficient Grounds.

See Judgment 1.

MOTOR VEHICLES.

Contract for Sale and Warranties.

See Sales, 6–10.

MUNICIPAL CORPORATIONS.

Municipal Corporations—Police Detective—Negligent Shooting—Liability.

1. Although a police officer might justifiably discharge a weapon to recapture an escaping prisoner, yet if the shooting were done in a public place, where the police officer should have known that people were likely to congregate or pass, it might constitute such negligence as to render the officer civilly liable for such injury as he might inflict upon an innocent person. (Askay v. Maloney, 333.)

Municipal Corporations—Police Officers—Liability on Bond.

2. In action against police detectives and their surety for death from accidental shooting of deceased as the detectives were recapturing an escaping prisoner, it was not error to refuse to require plaintiff to elect the officer who caused the injury, where it appeared that both officers were firing shots. (Askay v. Maloney, 333.)

Municipal Corporations—Police Officers—Liability on Bond.

3. Under Sections 348, 349, L. O. L., as to bonds of city officers, and allowing action thereon by the one injured by the principal's delinquency, a surety company bonding city detectives was properly joined in action against them for death from their negligent shooting; and a prior judgment against the principals and satisfaction by them was unnecessary, for, the bond having been given under the statutes, it was an official bond, and deemed to give the statutory remedy. (Askay v. Maloney, 333.)

Municipal Corporation—Streets—Failure to Repair—Liability.

4. Under Portland city charter, empowering the council to make needful regulations to maintain public streets, it is the imperative duty of the city council to see that the streets are kept in good repair. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

5. The duty of the city council of Portland to keep its streets in repair does not end with the passage of an ordinance requiring officers to examine into and report the condition of streets, but there must be some diligence to learn whether the officers perform the duties assigned. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

6. The duty of a Portland councilman as to repair of streets, in the absence of actual knowledge of a defect, is performed when he has used his best efforts to provide means to keep streets in repair and to have a sufficient force of employees to report defects as they occur and to make the repairs. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

7. The liability to each Portland officer for failure to make repairs to streets is personal, and depends upon the diligence which he himself exercises. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

8. Section 281 of the charter of the City of Portland, which attempts to exempt the city from liability for injuries arising from

defective streets and to place that liability upon the officer by reason of whose negligence the injury occurred, does not create any new or additional obligation as against such officer, as a city official who personally neglects to perform a specific duty was always liable, irrespective of any statute prescribing such liability. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

9. Regardless of charter provisions exempting City of Portland from liability for injuries to pedestrians by reason of defects in streets, the city is liable on the doctrine of *respondeat superior* for a failure of a street inspector to repair a defect which caused an accident. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability.

10. While, before attempted exemption of City of Portland from liability for defects in streets, the negligence of its officers, either the council or subordinate officers, was imputable to it, such liability was not transferred to the shoulders of any city officer not actually or constructively negligent. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Repair—Liability—Notice of Defects.

11. A defect in a street, which was noticed by only a few residents of the immediate community, though it had existed for several weeks, was not so notorious as that the city or its officers should have known thereof, so as to charge them with negligence in failing to make repairs. (Colby v. City of Portland, 359.)

Municipal Corporations—Streets—Failure to Maintain—Liability—Evidence—Admissibility.

12. Since it is the Portland city engineer's duty to inspect all streets and walks, in estimating his diligence, it is proper to show the mileage of streets in the city and the efforts made by him personally to secure a proper and complete inspection and repair. (Colby v. City of Portland, 359.)

Municipal Corporations—Ordinances—Passage—Form.

13. A substantial compliance with a charter requirement as to the form of ordinances is sufficient. (Colby v. City of Medford, 485.)

Municipal Corporations—Ordinances—Charter Amendments—Form—Constitutional Law—Enacting Clauses.

14. Article IV, Section 1, of the Constitution, declaring that "the style of all bills shall be: 'Be it enacted by the people of the state,' etc.," does not apply to municipal ordinances or charter amendments initiated and adopted by the legal voters of a city. (Colby v. City of Medford, 485.)

Municipal Corporations—Charters—General and Special Acts—Ordinances—Form.

15. Section 3224, L. O. L., relating to forms of ordinances, being one of the sections of a general incorporation act, does not apply to a city incorporated under a special act. (Colby v. City of Medford, 485.)

Municipal Corporations—"Ordinances"—Charters—Amendments—Enacting Clauses.

16. A section of a charter, providing that all "ordinances" shall contain an enacting clause, which was in the charter before the iniative power to amend the charter was given to the voters of a city, does not apply to amendments to the charter. (Colby v. City of Medford, 485.)

Municipal Corporations—Charter Amendments—"All Measures."

17. The term "all measures," in a section of a city ordinance requiring enacting clauses, *held* to apply to amendments to the charter, whether initiated by the people or submitted by the council. (Colby v. City of Medford, 485.)

Municipal Corporations—Initiative and Referendum—Elections—Enacting Clause.

18. Where an ordinance requiring an enacting clause to charter amendments was in effect at the time of the initiative petition, indorsement by the council, and publication of a proposed charter amendment, but such ordinance was amended the day before the election, making an enacting clause unnecessary, the charter amendment was legally adopted, though it contained no enacting clause; the election being the vitalizing act, and all going before being mere formality and preparation. (Colby v. City of Medford, 485.)

Municipal Corporations—Ordinance—Passage—Enacting Clause.

19. In the absence of an ordinance, statute or Constitution prescribing it, an enacting clause is not necessary in the passage of an ordinance. (Colby v. City of Medford, 485.)

Municipal Corporations—Initiative and Referendum—Procedure—Constitutional and Legislative Acts.

20. Section 3482, L. O. L., providing that 90 days elapse between petition and election on an initiative measure, has no application to towns or cities that have prescribed their own procedure, under Article IV, Section 1a, of the Constitution, empowering a city or town to provide its own method, and an ordinance requiring but 30 days is valid. (Colby v. City of Medford, 485.)

Municipal Corporations—Initiative and Referendum—Ordinances—Procedure.

21. Where a city ordinance provided that the council, if it disapproved an initiative proposed amendment to the charter, could propose a competing amendment to submit at the same election, the voters could also submit such an amendment, though nothing was said about the voters submitting a competing amendment. (Colby v. City of Medford, 485.)

Municipal Corporations—Initiative and Referendum—"Proposed by the Council"—"Proposed by Initiative Petition."

22. Although a city council caused a certain measure to be prepared, but the legal voters petitioned for the measure, the measure was "proposed by initiative petition," and not "proposed by the council," within the meaning of an ordinance providing that such measures could be proposed by the council or by initiative petition. (Colby v. City of Medford, 485.)

Municipal Corporations—Bonds—Special Assessments.

23. Sections 3245–3253, L. O. L., providing that certain special assessments can be bonded, do not include bonds for water mains. (Colby v. City of Medford, 485.)

Municipal Corporations—Improvements—"Contract"—"Impairing Obligation of Contract."

24. Where, under Sections 3245–3253, L. O. L., a property owner takes the privilege of paying a special assessment in installments and waives all irregularities as provided therein, there is a "contract," and an amendment, changing the number and amounts of the installments without the consent of the owner, is invalid, as "impairing the obligation of a contract," within the meaning of Article I, Section 10 of the United States Constitution, and it is no defense that the change is advantageous to the owner. (Colby v. City of Medford, 485.)

Municipal Corporations—Assessments—"Contract"—"Impairing Obligation of Contract"—Taxation.

25. Where, under Sections 3245–3253, L. O. L., a property owner takes the privilege of paying a special assessment in installments, and waives all irregularities as provided therein, there is a "contract"; but an amendment to the charter which increases the penalties upon delinquency does not "impair" its obligations, laws prescribing procedure and method of collecting delinquent assessments being but remedies, and not "contracts," within the meaning of Article I, Section 10, of the United States Constitution. (Colby v. City of Medford, 485.)

Municipal Corporations—Contracts—"Taxation."

26. The power to assess for special benefits is embraced in the power of taxation; and when it is alleged that a city has surrendered by force of contracts any part of its sovereign power to tax, the agreement must be clearly manifested. (Colby v. City of Medford, 485.)

Municipal Corporations—Assessments—Delinquency—Sale—Who may Buy.

27. It is competent to authorize a city to purchase land, in the absence of bidders at a delinquent assessment sale, even though the legislation conferring the authority is enacted after an assessment is made and before the sale for delinquency. (Colby v. City of Medford, 485.)

Municipal Corporations—Power to Assess—Waiver of Liens.

28. Where a city fails to enforce payment of special benefit assessments, and levies a general tax to pay interest on the bonds for such improvements, it does not waive its lien on the property. (Colby v. Medford, 485.)

Municipal Corporations—Special Benefit Assessment Bonds—Liability.

29. Sections 3245–3253, L. O. L., providing for the issuance of bonds to cover special benefit assessments, contemplates that such bonds shall be regarded as liabilities of the city, which the city must pay, without regard to whether the assessments have been or can be collected. (Colby v. City of Medford, 485.)

Municipal Corporations—Special Benefits—Bonds—Taxation.

30. A general tax by a city to pay interest on bonds issued to cover special benefit assessments, under Sections 3245–3253, L. O. L., *held* not invalid; the bonds being a debt of the city. (Colby v. City of Medford, 485.)

Municipal Corporations—Taxation—Assessments—Payment of Interest.

31. Where a general tax was levied by a city to pay interest on bonds issued to cover special benefit assessments, under Sections 3245–3253, L. O. L., the refusal of the city to accept the tender by a property owner of the assessments without interest was proper. (Colby v. City of Medford, 485.)

Municipal Corporations—Constitutional and Statutory Provisions.

32. The amendments to Article IV, Section 1a, providing for initiative and referendum, and Article XI, Section 2, of the constitution, relating to incorporation of municipalities, have not shorn the legislature of power to enact general laws concerning cities and towns. (Colby v. City of Medford, 485.)

Municipal Corporations—Special Benefit Assessments—Statutes.

33. Sections 3245–3253, L. O. L., providing that owners of property may postpone payment of assessments by dividing them into installments, applies to every incorporated town and city, and although a city can legislate concurrently on the same subject, it cannot compel an owner to accept its plan. (Colby v. City of Medford, 485.)

Municipal Corporations — Paving — Procedure — Notice — Protest — Laches.

34. Where a city council at different times passed resolutions of intention to pave two parts of a street, in which there were defects in publication and posting, but afterward passed a resolution of intention to pave the whole included parts of the street, with proper notice and publication, the council having unlimited power to contract, except that proper notice should be given of the assessments and intention to pave, and a chance given for protest, such defective resolutions cannot invalidate the improvement and assessment proceedings as to a property owner who did not protest at the time and waited six years before protesting. (Colby v. City of Medford, 485.)

Municipal Corporations—Improvements—Records.

35. The words "whereas, no protests were received," in a resolution ordering paving, and "no protests having been filed," in the assessment ordinance, is a sufficient showing as to the question of protests after six years. (Colby v. City of Medford, 485.)

Municipal Corporations—Special Benefit Assessments—Bonds.

36. Under Sections 3245–3253, L. O. L., relating to bonding cities, and providing that no application to pay assessments in installments shall be received if the amount of the assessment, with any previous unpaid assessment, "shall equal or exceed the valuation of said property, as shown by the last tax-roll," it is immaterial that the actual value is less than the assessment. (Colby v. City of Medford, 485.)

Municipal Corporations—Improvements—Assessments—Amount—Conclusiveness.

37. Where no fraud is alleged, and the owner admits some benefit from an improvement, a finding by the city council "that the special and peculiar benefit accruing upon each lot * * and in just proportion to benefits" was the amount so assessed is conclusive. (Colby v. City of Medford, 485.)

Municipal Corporations—Paving—Front Foot Rule—Validity.

38. The front foot rule of assessment for paving is valid. (Colby v. City of Medford, 485.)

Municipal Corporations—Paving—Street Intersection—Special Assessments—Discretion of Council.

39. Where it is discretionary with a city council to include or exclude the cost of intersections when making paving assessments, it cannot be prevented from levying special assessments for an improvement, even though it has in the past paid for the same kind of improvement by general taxation. (Colby v. City of Medford, 485.)

Municipal Corporations—Public Improvements—Delegation of Powers.

40. The power of the council of a city to "determine the character, kind and extent of improvements" to be made cannot be delegated to the city engineer. (Lawrence v. City of Portland, 586.)

Municipal Corporations—Public Improvements—Delegation of Powers.

41. Where a city council ordered the city engineer to submit plans for two kinds of paving, and he complied, and thereafter the council called for bids, accepted the lowest bid and by ordinance determined the character, kind and extent of the improvements, the council did not delegate its functions to the city engineer. (Lawrence v. City of Portland, 586.)

Municipal Corporations—Public Improvements—Notice—Requisites.

42. Under Portland City Charter, Section 376, the notice of the resolution of an improvement need not be printed in letters not less than one inch in length, but only the title, "Notice of Street Work," need be of such size. (Lawrence v. City of Portland, 586.)

Municipal Corporations—Public Improvements—Double Improvement.

43. The paving of a street, whose continuity was interrupted by a small park, does not constitute two improvements, so as to require their separation, in view of Portland City Charter, Section 374, as to public improvements. (Lawrence v. City of Portland, 586.)

Municipal Corporations—Public Improvements—Exaction of Guaranty—Powers of Council.

44. The requirement in a contract for paving a street that the contractor shall make good any defects in materials or workmanship occurring within five years does not so increase the burden or the cost of the improvement as to vitiate the assessments therefor. (Lawrence v. City of Portland, 586.)

Municipal Corporations—Public Improvements—Performance of Contract—Powers of Council.

45. The determination made by the council that the specifications and the contract of a paving contractor have been fulfilled and completed is conclusive. (Lawrence v. City of Portland, 586.)

NAMES.

Doing Business Under Assumed Names.

See Partnership, 3.

NAVIGABLE WATERS.

Navigable Waters—Tide-lands—Grants—Effect.

1. The title of the owner of tide-lands, coming to him from the state, is impressed with the *jus publicum*, or public ownership, which was retained by the state, and which includes the public rights of navigation and fishery. (Johnson v. Jeldness, 657.)

Navigable Waters—Littoral Rights—Fish-traps.

2. The owner of tide-lands, on a navigable stream, cannot be deprived of his rights to draw seines along his lands by erection of fish-traps by private individuals under federal license, on the theory that such persons are acting under the *jus publicum*, since they act in their own interests, and cannot invoke the rights of the public. (Johnson v. Jeldness, 657.)

Navigable Waters—Littoral Rights—Fish-traps.

3. Act Cong. Feb. 14, 1859, Chapter 33, Section 2, 11 Stat. 383, providing that the State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state and other states, and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, merely declares and preserves the *jus publicum*, including the public rights of navigation and fishery; but a freeholder whose close abuts upon such waters is entitled to the aid of the courts to maintain his right against invasion by private persons in his own interest. (Johnson v. Jeldness, 657.)

NEGLIGENCE.

Liability of Public Officer for Negligence of Inferior Officer.

See Officers. 1.

NEW TRIAL.

New Trial—Causes of Action Open.

1. Failure of plaintiff on the first trial to sustain or press his second cause of action does not preclude him from introducing evidence in support thereof on the second trial; a new trial being had just as though there had never been a previous one. (Elling v. Blake-McFall Co., 91.)

New Trial—Setting Aside Judgment—Power of Court.

2. Where such mistake at law has been made as would warrant reversal, the trial court may, on motion or at its own suggestion, set aside the judgment and grant a new trial. (Webb v. Isensee, 148.)

New Trial—Correction of Error by Trial Court.

3. When the trial court timely discovers that an error has been effected to the prejudice of the defeated party, so that the determina-

tion would be reversed on appeal, it may correct the error by setting aside the judgment and granting new trial. (Smith v. Campbell, 420.)

See Appeal and Error, 7, 8, 10.

NOLLE PROSEQUI.

Authority to Allow.

See Criminal Law, 7–9.

Proof of Agreement.

See Indictment, 1.

NOTICE.

See Appeal and Error, 11, 16.
See Attachment, 2.
See Mechanics' Liens, 1–3.
See Municipal Corporations, 11, 34, 42.

NUISANCE.

Nuisance—Public Rights—Special Damage.

1. The owner of tide-lands on a navigable stream suffers such special damage by invasion of his right of access to his property that he has a sufficient standing in a court of equity to enjoin encroachment, since his right of access attaches equally to every part of his shore line. (Johnson v. Jeldness, 657.)

OBJECTIONS.

See Appeal and Error, 20.
See Costs, 2.

OFFICERS.

Officers—Negligence of Inferior Officer—Liability.

1. It is the universal rule that a public officer is not personally liable for the negligence of an inferior officer, unless he, having the power of selection, has failed to use ordinary care in the selection. (Colby v. City of Portland, 359.)

See Arrest, 1.
See Corporations, 9–11.
See Municipal Corporations, 1–3, 4–12.

OPTION.

Interest of Option Holders.

See Libel and Slander, 5.

ORDINANCES.

See Municipal Corporations.

OREGON CASES.

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PAROL EVIDENCE.

See Evidence, 1, 6, 7.

PARTIES.

See Appeal and Error, 11.
See Corporations, 3.

Parties to be Served With Notice of Appeal.

See Appeal and Error, 16.

PARTNERSHIP.

Partnership—Requisites.

1. A partnership for the purpose of raising a crop of hops does not exist between two men where one of them has exclusive authority to sell the crop, the principal property of the concern. (Gong v. Toy, 209.)

Partnership—Accounting—Cross-bill.

2. In a law action on notes, where liability is so inextricably involved with a partnership transaction that nothing short of an accounting could furnish data necessary to determine the issues of the action, a cross-bill in equity for an accounting is proper. (Jones v. Skiles, 554.)

Partnership—Assumed Name—Failure to Comply With Statute—Waiver of Defect.

3. The registration requirements of Laws of 1913, page 270, to be complied with by persons doing business under assumed names before bringing suit, will be waived by failure to object to bringing of the action by answer or demurrer; Section 68, L. O. L., providing that a demurrer lies when a pleading attacked shows on its face that plaintiff has not legal capacity to sue, and Section 71, providing that when such defects do not appear from the fact of the complaint the objection may be taken by answer, in view of Section 72, providing that if such objection be not taken by demurrer or answer it will be deemed to have been waived, excepting only objections to jurisdiction, and that complaint does not state facts sufficient to constitute a cause of action. (Benson v. Johnson, 677.)

PAVING.

See Municipal Corporations, 34, 38, 39.

PAYMENT.

Payment—Sufficiency—Payment by Note.

1. Although the delivery and acceptance of a note does not extinguish the original indebtedness unless the parties agree to give and accept the note as absolute payment, the agreement need not be expressed in terms, but it is sufficient if it appears from all the facts and circumstances that the parties intended and understood that the note should be received in absolute payment of the antecedent debt. (Riner v. Southwestern Surety Ins. Co., 293.)

PERFORMANCE.

See Sales, 4, 5.

PERSONAL INJURIES.

See Appeal and Error, 17.
See Carriers, 1, 2.
See Damages, 8.
See Insurance, 5, 6.
See Master and Servant, 1–6, 8–12, 23, 24.
See Trial, 5.

PLATS.

See Dedication, 8.

PLEADING.

Pleading—Misjoinder of Causes—Waiver of Objection.

1. Objection to any misjoinder of claim for loss of consortium of wife with that for personal injuries to plaintiff is waived by not being taken by demurrer to complaint, pursuant to Section 68, subdivision 5, L. O. L. (Elling v. Blake-McFall Co., 91.)

Pleading—Code—General Denial—Scope.

2. Amendment to Section 73, L. O. L., only permits a general denial, at election of defendant, to take place of former specific contradiction of material allegations of plaintiff's primary pleading, but does not enlarge original scope of the answer. (Hickey v. Coffey, 383.)

Pleading—Demurrer—Assumption of Fact.

3. On a demurrer to a complaint, the allegations in the complaint must be assumed to be true. (Jones v. Skiles, 554.)

Pleading—Demurrer—Misjoinder—Contract and Tort.

4. A complaint, pleading separately (1) an alleged breach of contract arising out of the purchase of tickets to a theater, and (2) removal to the lobby by the use of force and violence, was demurrable in view of Section 68, L. O. L., making a demurrer the method of attacking a misjoinder of causes of action. (Allen v. The People's Amusement Co., 636.)

Pleading—Election Between Defenses—Powers of Court.

5. The Circuit Court has power to require an election between affirmative defenses, provided the application of plaintiff is made

seasonably, and the action of the court is based on some good reason shown by the record. (Swank v. Moisan, 662.)

Pleading—Inconsistent Defenses—Election—Powers of Court.

6. Since answers are not inconsistent so long as they may both be true, an answer in an action on a note, alleging as agreement for exchange of automobiles, the note being given to cover the difference, and setting up certain warranties which were broken, is not so inconsistent with a second answer alleging invalidity of the sale by reason of failure to comply with Laws of 1911, page 265, Section 3, as to registering ownership that an election of answers should have been required. (Swank v. Moisan, 662.)

See Appeal and Error, 20.
See Bankruptcy, 2.
See Criminal Law, 4, 11.
See Fraudulent Conveyances, 5.
See Judgment, 1.
See Landlord and Tenant, 4, 5.
See Master and Servant, 11, 18.
See Sales, 4, 5.
See Trusts, 10.

Necessity for Showing of Merits by Answer or Objections.

See Judgment, 1.

POLICE OFFICER.

See Arrest, 1.
See Municipal Corporations, 1–3.

PORTLAND, CHARTER OF.

See Askay v. Maloney, 343.
See Colby v. City of Portland, 359.
See Duniway v. Wiley, 86.
See Lawrence v. City of Portland, 586.

POSSESSION.

See Sales, 1.

Right of Possession to Property of Prisoner.

See Arrest, 2.

Mortgagee in Possession of Property.

See Mortgages, 1, 4.

POWERS.

Powers—What Law Governs—Execution.

1. Where the donor of a power lived in New York, and trust property and trustee were located there, the law of such state governs in determining whether the power was validly executed, although donee lived, and attempted to exercise such power, in Oregon. (Hollister v. Hollister, 316.)

Powers—Execution.

2. At common law, the donee of a power must clearly manifest an intention to execute it, and where it is clear that the donee intended

to execute it, and the transaction is susceptible of no other interpretation, then it is deemed executed. (Hollister v. Hollister, 316.)

See Wills, 2.

PRESUMPTIONS.

See Evidence, 3, 5.
See Fraud, 1.
See Fraudulent Conveyances, 2.
See Insurance, 9, 10.
See Master and Servant, 2.
See Property, 1.

PRINCIPAL AND AGENT.

Principal and Agent—Burden to Establish Relation—Action on Contract.

1. Where a third party is sought to be held on a contract alleged to have been executed by an agent, the party seeking to enforce the contract must establish the alleged agency. (Smith v. Campbell, 420.)

Principal and Agent—Authority—Proof by Agent's Statements.

2. An agent's authority cannot be proved by his own statements that he is such an agent. (Smith v. Campbell, 420.)

Principal and Agent—Acts of Agent—Proof Against Agent.

3. Before the acts of an agent can be shown against the principal. the agency must be shown. (Smith v. Campbell, 420.)

Principal and Agent—Contract by Agent—Sufficiency of Evidence.

4. In an action for breach of contract, evidence *held* sufficient to sustain finding that the contract was the contract of defendant, for whom plaintiff did the work, though it was signed by defendant's son. (Smith v. Campbell, 420.)

Principal and Agent—Authority of Agent—Evidence.

5. In an action for breach of contract whereby plaintiff agreed to saw the timber on defendant's land for a price per cord, defendant's statements were admissible to prove the authority of his son, who executed the contract, to act for him. (Smith v. Campbell, 420.)

What Constitutes Relation.

See Master and Servant, 7.

PROCESS.

Affidavit for Service of Summons by Publication.

See Judgment, 1.

PROPERTY.

Property—Evidence of Title—Presumption—Statute.

1. The legal probabilities regarding ownership of personal property established by Section 799, L. O. L., are not conclusive presumptions although they are sufficient to support a *prima facie* case. (Benson v. Johnson, 677.)

See Corporations, 5.
See Mortgages, 1–5.

PROXIMATE CAUSE.
See Attachment, 4.

PUBLIC IMPROVEMENTS.
See Municipal Corporations, 24, 35, 37, 40–45.

QUANTUM MERUIT.
See Executors and Administrators, 1–6.

QUESTION FOR JURY.
See Carriers, 2.
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See Master and Servant, 3, 20.

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See Attorney and Client, 2, 3.
See Corporations, 9–11.

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See Appeal and Error, 7, 9, 15.
See Municipal Corporations, 35.

REDEMPTION.
See Mortgages, 2, 5.

REMITTITUR.
See Sales, 3.

RENT.
See Landlord and Tenant, 1, 3.

REPLEVIN.

Replevin—Right to Writ.

1. Though, as a general rule, replevin cannot be maintained to recover an undivided interest in a specified article of personalty, it will lie to recover an undivided interest in a specified article of personalty if the property sought to be recovered is part of a larger mass of the same nature and quality. (Halsey v. Simmons, 324.)

Replevin—General Denial.

2. In an action to recover bank note which plaintiff claimed was assigned to him by one accused of obtaining money by false pretenses, where only defenses pleaded were general denial and that money belonged to persons whom accused had defrauded, and undisputed evidence shows it belongs to accused, court erred in submitting to jury and admitting evidence on question whether assignment was made in good faith, since under a general denial only evidence tending directly to disprove plaintiff's title or right of possession

is admissible, and defense that assignment was made in bad faith, and plaintiff's title therefore voidable, must be specifically pleaded. (Hickey v. Coffey, 383.)

See Evidence, 5.
See Tenancy in Common, 1.

RESCISSION.

See Bankruptcy, 1.
See Logs and Logging, 3, 6, 7.
See Vendor and Purchaser, 4, 7–12.

REVIEW.

See Appeal and Error, 5, 6, 8–10, 12, 14, 18, 21.
See Master and Servant, 13, 14.
See Taxation, 1–3.

SAFE PLACE TO WORK.

See Master and Servant, 21, 22, 24.

SALES.

Sales—Conditional Sale—Retention of Possession.

1. Where plaintiff agreed to sell sawmill machinery to defendant's mortgagor, and the latter agreed to give lumber in payment, it being agreed that plaintiff should retain "possession" of the machinery until it was fully paid for in lumber, the written contract, embodying such terms, did not evidence a conditional sale. (Maxson v. Ashland Iron Works, 345.)

Sales—Conditional Sale—Recordation of Contract—Statute.

2. By Section 7414, L. O. L., it is unnecessary to the validity of a conditional sale that the contract be recorded, unless the property, title to which has been reserved, has been so attached to realty as to become a fixture. (Maxson v. Ashland Iron Works, 345.)

Sales—Action Against Mortgagee of Conditional Vendee—Remittitur.

3. Where verdict and judgment were rendered for plaintiff, in his action of replevin, that he was the owner of the demanded machinery, and entitled to immediate possession or a recovery of $500 as its value, the trial court could not require plaintiff to remit part of the amount on the ground that he had received such part of the purchase price of the machinery conditionally sold to defendant's mortgagor. (Maxson v. Ashland Iron Works, 345.)

Sales—Actions—Pleading—Performance.

4. Where a contract for the sale of lumber provided for part payment in advance, and excused default resulting from accident, etc., plaintiff's complaint, which did not aver performance on its part, or readiness to perform, is insufficient to state a cause of action, particularly where defendant attempted to excuse its nonperformance on the ground of accident beyond its control; for in an action on a contract containing mutually dependent covenants plaintiff must allege full performance, or readiness and ability to perform, on his part, be-

fore he can put defendant in default and claim damages. (Davis Lum. Co. v. Coats Lum. Co., 542.)

Sales—Performance—Complaint.

5. Where defendant by its answer sought to excuse nonperformance of a contract of sale, but did not repudiate it, the complaint, which failed to aver performance or readiness to perform by plaintiff, cannot be sustained on the theory that it was unnecessary for plaintiff to tender performance of a vain thing. (Davis Lum. Co. v. Coats Lum. Co., 542.)

Sales—Invalid Contracts—Warranties—Validity.

6. If a contract of sale of an automobile was invalid, warranties of the machine made by the seller are also invalid. (Swank v. Moisan, 662.)

Sales—Automobiles—Registration of Title.

7. Laws of 1911, page 265, Section 3, requiring the vendor of an automobile within five days after the sale to report to the Secretary of State the name and address of the vendee, or providing that the vendee may, within ten days, have the license number transferred to himself, and providing that no sale or transfer shall be valid without compliance with the statute, a sale without compliance is not invalid *ab initio*, but the statute merely attaches a contingent condition subsequent on which the sale may become abortive. (Swank v. Moisan, 662.)

Sales—Validity.

8. There is a vital distinction between a contract void *ab initio* and a contract merely voidable. (Swank v. Moisan, 662.)

Sales—Invalidity—Rights of Parties.

9. Where a sale of an automobile was invalid for failure to comply with Laws of 1911, page 265, Section 3, the vendor could replevy the automobile and recover the value of its use, though he could not recover on a note given to evidence the purchase price. (Swank v. Moisan, 662.)

Sales—Action for Price—Defenses.

10. In action on note given on exchange of automobiles, where answer set up defense of breach of warranty and of failure to comply with Laws of 1911, page 265, Section 3, as to registration of title, since the plaintiff could not recover on the note if the sale was invalid, the second answer set up a substantial defense, and it was error to require an election. (Swank v. Moisan, 662.)

See Logs and Logging, 1, 3–8.

SATISFACTION.

See Insurance, 2, 3.

Who may Buy for Delinquent Assessments.

See Municipal Corporations, 27.

SETOFF AND COUNTERCLAIM.

See Mortgages, 3.

SIDEWALK.

See Dedication, 13.

SLANDER.

Slander of Business.

See Libel and Slander, 1–3.

Slander of Title.

See Libel and Slander, 4–7.

SPECIAL BENEFITS.

See Municipal Corporations, 29, 30, 33, 36.

STATE INDUSTRIAL ACCIDENT COMMISSION.

Procedure upon Refusal to Award Compensation.

See Master and Servant, 13, 14.

STATUTE OF FRAUDS.

Frauds, Statute of—Parol—Modification.

1. Ordinarily, an agreement within the statute of frauds cannot be varied by parol. (Rogers v. Maloney, 61.)

Frauds, Statute of—Parol—Modification—Estoppel.

2. Where a parol modification of a lease has been acted upon by a party to his disadvantage, the other party cannot set up the statute of frauds and stand on the original agreement. (Rogers v. Maloney, 61.)

Frauds, Statute of—Contract not to be Performed Within Year—Attorney's Contract to Contest Assessments.

3. An attorney's contract with property owners to contest proceedings that were being taken and might be taken in the future by a city to levy and collect assessments for a municipal improvement was not within the statute of frauds (L. O. L., § 808, subd. 1), as not to be performed within a year, since only where the contract shows by its terms, or where it is within the contemplation of the parties, that it cannot be performed within a year, does the statute apply, and in general a verbal stipulation to render a particular service which fixes no definite or contingent time for performance, but is capable of performance within a year, is not controlled by the statute. (Duniway v. Wiley, 86.)

Frauds, Statute of—Promise to Answer for Debt or Default of Another.

4. Where defendant contracted with plaintiff that plaintiff should saw the timber on defendant's land for a price per cord, the agreement being made by defendant himself, and the written memorial being executed in his presence by his son, whose name was inserted, as he was going to look after the supervision of the work on the ground, defendant's promise was not within the statute of frauds as a promise to answer for the debt or default of another, but an agreement by defendant to pay his own debt. (Smith v. Campbell, 420.)

See Trusts, 1.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTES.

Statutes—Foreign Statutes—Necessity of Pleading.

1. Where appellee's brief recites and relies upon New York statutes and decisions, and appellant admits they are correctly stated, the Supreme Court will consider them, where the rights of strangers are not involved, although such statutes and decisions were not pleaded. (Hollister v. Hollister, 316.)

Statutes—Special or Local Legislation—Punishment of Crime.

2. General Laws of 1917, page 794, providing a license tax for dogs to be collected by the constables in the several counties declared to be subject to the law, etc., Section 10 providing that any person violating the act shall be deemed guilty of a misdemeanor, which excepts from its operation all of the territory east of the summit of the Cascade Mountains, and the counties of Josephine, Jackson, Coos, Curry, Lincoln, Tillamook, Clatsop and Columbia, is violative of Article IV, Section 23 of the Constitution, providing that the legislature shall not pass special or local laws for the punishment of misdemeanors. (Lewis v. Varney, 400.)

Statutes—Enacting Clauses—Constitutional Law.

3. Under the Constitution of Oregon (Article IV, Section 1), declaring that "the style of all bills shall be" of a prescribed form, a statute must contain an enacting clause. (Colby v. City of Medford, 485.)

See Animals, 1.
See Attachment, 1.
See Corporations, 5.
See Divorce, 2, 4, 5, 7.
See Evidence, 5, 6.
See Intoxicating Liquors, 5.
See Master and Servant, 10.
See Municipal Corporations, 15, 20, 24, 25, 32, 33.
See Pleading, 2.
See Property, 1.
See Sales, 2.
See Taxation, 2.
See Witnesses, 1.

Construction of Prohibition Statute.

See Intoxicating Liquors, 1, 2.

Doing Business Under Assumed Name.

See Partnership, 3.

STAY.

See Appeal and Error, 4.

STEALING.

See Criminal Law, 3.

STIPULATIONS.

Stipulations—Construction.

1. Where, in an action on an indemnity policy, a stipulation is filed on day of final judgment, though entered into prior thereto, but subsequent to accrual of liability of defendant to plaintiff, that certain sum in which plaintiff is indebted to defendant, with interest thereon, is a proper legal setoff, which does not fix date to which interest is to be calculated and leaves blank space for insertion of amount, where judgment of lower court allows interest to date of its rendition and plaintiff does not complain of it in that respect until after rendition of judgment in Supreme Court, it must be inferred from language of stipulation, surrounding circumstances, and actions of parties that they intended interest should run until judgment entered in trial court, not merely till liability of defendant to plaintiff accrued. (Riner v. Southwestern Surety Ins. Co., 293.)

STOCK.

See Corporations, 2–4, 7.

Stock Subscription Agreement.

See Corporations, 1.

Rights of Legatee of Stock.

See Wills, 4, 7.

STOCKHOLDERS.

See Corporations, 2–4.

STREETS.

See Municipal Corporations.

Liability for Failure to Repair.

See Municipal Corporations, 4–12.

Paving Street Intersections.

See Municipal Corporations, 39.

SUIT MONEY.

See Divorce, 2, 3.

SUMMONS.

See Process.

TAXATION.

Taxation—Excessive Valuation—Evidence—Sufficiency.

1. In an appeal from a decision of the board of equalization refusing to lower a tax on petitioner's timber land, *held* under evidence that petitioner failed to establish that the estimates upon which the assessment was based were incorrect or that the land was assessed for more than its cash value. (Weyerhaeuser Land Co. v. Board of Equalization, 434.)

Taxation—Assessment—Review by Court.

2. To warrant a reduction of an assessment upon appeal to this court, it must be shown that the means adopted by the assessor were

wrong and that the result arrived at was greater than the actual cash value of the property assessed, in view of Laws of 1913, page 325, section 8, providing that, if the court finds that the assessment was made fairly and in good faith at actual cash value, the assessment shall be approved. (Weyerhaeuser Land Co. v. Board of Equalization, 434.)

Taxation—Assessment—Review.

3. The valuation placed upon property by the assessor for the purpose of taxation is *prima facie* correct, and a party assailing an assessment as excessive must make it appear that the assessment does not represent the fair value of the property. (Weyerhaeuser Land Co. v. Board of Equalization, 434.)

Taxation—"Interest"—"Penalty."

4. Interest, when charged on a delinquent tax, is a penalty to insure prompt payment, and is not a consideration for the forbearance of money, or a part of the tax. (Colby v. City of Medford, 485.)

See Municipal Corporations, 25, 26, 30, 31.

TENANCY IN COMMON.

Tenancy in Common—Right to Replevy Property.

1. As a general rule, one tenant in common of personalty cannot ordinarily maintain replevin against a co-owner, since he must have the right of exclusive possession, but where one co-owner of personalty susceptible of division repudiates the interest of the other and takes possession of the property and converts it to his own use, the other may maintain replevin. (Halsey v. Simmons, 325.)

TIDE-LANDS.

See Navigable Waters, 1–3.

Special Damage of Owner for Encroachment.

See Nuisance, 1.

TIME.

Time of Filing Transcript.

See Appeal and Error, 15.

To Rescind Contract for Fraud.

See Vendor and Purchaser, 9.

TITLE.

Evidence of.

See Property, 1.

Partial Failure of Title.

See Vendor and Purchaser, 6.

To Land Divested by Estoppel.

See Estoppel, 1.

TOKEN.

Description of False Token.

See False Pretenses, 1, 3.

TRANSCRIPT.

Time of Filing.

See Appeal and Error, 15.

Expense of Making Transcript Taxed in Lower Court.

See Costs, 4, 5.

TRIAL.

Trial—Instructions—Questions of Law and of Fact.

1. The requested instruction desired by defendant was properly refused on account of the matter set forth being a question of fact for the jury to pass upon, and where the petition fails to distinguish between questions of fact and questions of law, a rehearing will be denied. (Rogue River Assn. v. Gillen-Chambers Co., 113.)

Trial—Refusal of Request Excluding Evidence.

2. In action for injuries resulting from automobile accident, it was proper to refuse a requested instruction which would have taken from the jury certain evidence that at the time of the accident the driver was endeavoring to sell defendant's car to defendant's customer. (Houston v. Keats Auto Co., 125.)

Trial—Refusal of Request Covered by Charge.

3. In action for injuries resulting from an automobile accident, requested instruction was properly refused where it was substantially covered by given instructions. (Houston v. Keats Auto Co., 125.)

Trial—Conduct of Counsel—Improper Argument—Cure of Error.

4. In action for slander, where defendant's testimony contradicted that of all the plaintiff's witnesses so that his veracity was in issue, the error of plaintiff's counsel in stating to the jury in argument when he had not been a witness, that plaintiff's witnesses had testified truthfully because he had been there and heard defendant make the statements, was not cured by instructions taking such statement from the jury. (Webb v. Isensee, 148.)

Trial—Instructions—Contributory Negligence.

5. In an action for injuries by operator of a punch-press, in view of Employers' Liability Act, declaring that the contributory negligence shall not be a defense, but may be considered by the jury in fixing damages, instruction that contributory negligence should not be considered by the jury was erroneous. (Tabor v. Coin Machine Mfg. Co., 194.)

Trial—Instructions—Repetition.

6. The refusal of instructions covered by the general charge was not erroneous. (Emerson v. Portland E. & E. R. Co., 229.)

Trial—Instructions—Requests for.

7. In an action for death, for the jury to have the benefit of knowledge derived from mortality tables, plaintiff's counsel should request an instruction giving information on that subject. (Askay v. Maloney, 333.)

Trial—Instructions—Abstract Instructions.

8. In action for wrongful death, an instruction as to damages, considering deceased's age, habits, etc., not based on any evidence as to most of the elements adverted to, was abstract, and therefore erroneous. (Askay v. Maloney, 333.)

Trial—Findings of Fact and Conclusions of Law—Necessity.

9. Where the complaint failed to state a cause of action, the court, under Section 79, L. O. L., declaring that, at any time when the pleadings are complete and either party fails or declines to plead further, judgment may be rendered on the pleadings, properly sustained defendant's motion for judgment without filing findings of fact or conclusions of law, despite Section 158, requiring that upon trial of an issue of fact by the court its decision shall be in writing and shall state the facts and conclusions of law separately. (Davis Lum. Co. v. Coats Lum. Co., 542.)

Trial—Argument—Statement of Counsel.

10. Allowing counsel for plaintiff, in action for damages for fraud inducing a purchase, to state that plaintiff offers to take a certain sum and return the property, giving defendant till the next morning to accept, is error; it injecting a spurious issue, and also amounting to a self-serving declaration that plaintiff is disposed to compromise. (Chrudinsky v. Evans, 548.)

Trial—Verdict—Apportioning Damages.

11. In the absence of statutory authority, the jury may not apportion damages against defendants, sued as joint tort-feasors. (Chrudinsky v. Evans, 548.)

Trial—Verdict—Action for Joint Tort.

12. Section 180, L. O. L., authorizing judgment for or against one or more of several plaintiffs or defendants, does not allow of verdict and judgment in different amounts against defendants, sued as joint tort-feasors. (Chrudinsky v. Evans, 548.)

Trial—Findings of Fact—Necessity.

13. In an action for the price of a piano conditionally sold, where the sole defense was that the quality of the instrument was misrepresented by plaintiff, a judgment for the return of the piano could not be sustained, in the absence of a finding of fact as to whether the quality of the instrument was misrepresented. (McPheeters v. Smith, 595.)

Trial—Findings of Fact—Necessity—Requests.

14. Where the findings are sufficient to justify a judgment for one party, and the other party fails to object to them, or to request findings conformable to his theory, the findings made will stand; but such is not the rule where the findings made are insufficient to justify a judgment for either party. (McPheeters v. Smith, 595.)

Trial—Instructions—Evidence to Support.

15. While a party is entitled to have his theory of the case presented to the jury under proper instructions, there must be some testimony tending to support such theory. (Quinn v. Hawley Pulp & Paper Co., 630.)

Trial—Instructions—Evidence.

16. Evidence in a servant's action for injuries when piles of baled paper fell upon him *held* to warrant refusal of instruction based on theory that the plaintiff's work did not involve risk or danger within the Employers' Liability Law (Laws 1911, p. 16). (Quinn v. Hawley Pulp & Paper Co., 630.)

Trial—Instructions—Conformity to Issues.

17. An instruction embodying the provisions of Section 799, subdivision 40, L. O. L., that every sale of personal property capable of immediate delivery and every assignment thereof, unless accompained by immediate delivery and followed by actual and continued change of possession, creates a presumption of fraud as against creditors or subsequent purchasers, was properly refused, where the issue of fraud was not raised by the pleadings. (Benson v. Johnson, 677.)

See Appeal and Error, 14, 19.

TRUSTEE.

Action by Trustee in Bankruptcy.

See Bankruptcy, 2.

General Rule as to Rights, Duties, etc., of Trustee.

See Trusts, 2–9.

TRUSTS.

Trusts—Trust Agreement Concerning Land—Statute of Frauds.

1. In view of Section 804, L. O. L., providing that no estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property can be created, transferred or declared otherwise than by operation of law or by a conveyance or other instrument in writing, etc., in an action by a subscriber to corporate stock against a promoter to recover amount paid, the defendant could not rely upon a trust agreement regarding the property executed by other stockholders which the plaintiff did not sign. (Stewart v. King, 14.)

Trusts—Construction—Interest of Trustee.

2. Evidence *held* to show that in conveying property to a daughter-in-law in trust for grandchild it was the intention of the settlor that trustee and her husband should have a beneficial interest in the property during their son's minority. (Ranzau v. Davis, 26.)

Trusts—Trustee's Right to Disbursements—General Rule.

3. It is a general rule that disbursements which will be allowed a trustee will depend much upon the character of the trust and the directions given by the instrument of trust. (Ranzau v. Davis, 26.)

Trusts—Trustee's Right to Disbursements—Upkeep of Premises.

4. If a trustee has the power of managing the estate, he will be entitled to all the expenses of keeping it up, such as hire of servants, salaries, taxes, costs of repairs, rebuilding farm houses, manuring, draining, fencing and other like expenses. (Ranzau v. Davis, 26.)

Trusts—Expenditures for Which Estate is Liable.

5. To create a liability against a trust estate in favor of a third person, there must be more than the mere personal engagement of the trustee, for the expenses of properly administering a trust, although a lien on behalf of the trustee on the estate in his hands, are, not so as to a person employed by him, and in such cases the only remedy is against the trustee personally unless he is insolvent. (Ranzau v. Davis, 26.)

Trusts—Construction—Interest of Trustee—Deed to Mother for Son's Benefit.

6. A deed to a mother as trustee, if executed for the benefit of the son when he shall reach majority, clothes her with an executory trust, which does not become executed until the son reaches majority. (Ranzau v. Davis, 26.)

Trusts—Executory—Vested Title in Beneficiary.

7. So long as a trust is executory the legal title cannot vest in the beneficiary. (Ranzau v. Davis, 26.)

Trusts—Management of Property—Operation of Farm.

8. Where funds which were given to a daughter-in-law in trust for her son with the intention that she and her husband should have the benefit thereof until the son's majority were invested in a farm, the trustee and her husband had authority to operate the farm so as to yield an income for the purposes of the trust. (Ranzau v. Davis, 26.)

Trusts—Necessary Expenditures—Liability of Estate.

9. A trust estate was liable for services necessary for cultivating the property and caring for crops raised thereon which was in the interests of the beneficiary and for the benefit of the estate, since the trustee now insolvent had she paid such expenses would have had a just claim against the estate therefor. (Ranzau v. Davis, 26.)

Trusts—Enforcement—Supplemental Pleading—Expenses During Suit.

10. The remedy of a defendant, who, pending a suit resulting in a decree that property was held on a trust agreement, was compelled without assistance to bear the expense of preserving the property, redounding to the benefit of plaintiffs, as well as such defendant, is by application to the trial court for leave to file a supplemental pleading, to the end that the expenditures may be established as a necessary and proper expense, and charged against the property, and paid as other costs and disbursements of the suit. (Anderson v. Phegley, 627.)

UNDERTAKING.

Sufficiency of Sureties.

See Appeal and Error, 1.

Counter Undertaking for Stay of Proceedings.

See Appeal and Error, 4.

Liability of Police Officer for Negligent Shooting.

See Municipal Corporations, 1–3.

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UNITED STATES CONSTITUTION.

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See Dedication, 1–9.

Establishment of Sidewalk by User.
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USE AND OCCUPATION.

See Mortgages, 2, 3, 5.

VARIANCE.

See False Pretenses, 3.
See Master and Servant, 18.

VENDOR AND PURCHASER.

Vendor and Purchaser—Assumption of Vendor's Liabilities.

1. Where an orchard company contracted to sell orchard lands the contract containing stipulations, and went into bankruptcy, and a third person purchased the lands of the orchard company subject to the liens and encumbrances of its prior contracts of sale, expressly agreeing to assume them as part of the purchase price, the third person placed himself precisely in the situation of the company at the outset of the transaction between it and its vendee, and was bound to perform the company's covenants; if he desired to avoid such result, he should have foreclosed his contract with the party who with himself originally owned the land as tenants in common, whereby he might rid his own half of the land of the obligations of his agreement to sell his half to his cotenant, who organized the orchard company. (Stewart v. Mann, 68.)

Vendor and Purchaser—Breach of Contract by Vendor's Successor.

2. Where one cotenant agreed to sell orchard lands to another, and the latter organized an orchard company and conveyed the whole tract to it, and it contracted to sell to plaintiff on certain terms and became bankrupt, the first cotenant buying the lands at trustee's sale subject to the company's contracts of sale, expressly assuming them, and plaintiff vendee preferred a claim for damages for the neglect of the company and the first cotenant to cultivate the orchard lands as required by the orchard company's contract to sell, and the first cotenant repudiated the obligations originally resting upon the

company, his conduct constituted what plaintiff was entitled to consider a breach of the contract to sell the orchard lands. (Stewart v. Mann, 68.)

Vendor and Purchaser—Foreclosure of Vendee's Lien.

3. A vendee acquires an estate in land under an executory contract of sale in proportion as he pays the purchase price and is not in default in performance of his covenant; the vendor holding the legal title to such extent in trust for the vendee. When the seller repudiates or fails to perform, the vendee has the right to get out of the land what he put into it by foreclosing his vendee's lien. (Stewart v. Mann, 68.)

Vendor and Purchaser—Rescission—Placing in Statu Quo.

4. Where land was contracted to be sold, and, on the vendor corporation's bankruptcy, an original owner of the lands as cotenant bought at trustee's sale, subject to the company's contracts to sell, expressly assuming such liens and encumbrances, when such purchaser sought to rescind the company's contract to sell, he should have put the buyer in *statu quo*. (Stewart v. Mann, 68.)

Vendor and Purchaser—Foreclosure of Vendee's Lien—Effect of Denial of Liability.

5. Where vendor had absolutely denied any liability under and repudiated contract with vendee in proceedings for foreclosure of vendee's lien, vendor could not claim vendee's failure to cultivate premises as agreed upon. (Stewart v. Mann, 68.)

Vendor and Purchaser—Purchase-money Notes—Reductions—Partial Failure of Title.

6. Where the actual survey would have deprived the vendees of 10 feet from one side of the tract conveyed, but their grantor and his predecessors had, since 1903, all conveyed and held in accordance with an old division fence and with other fences which inclosed the amount of acreage conveyed, the vendees were entitled to no reduction from the purchase-money notes given at sale in 1912. (Mickenham v. Gralapp, 166.)

Vendor and Purchaser—Remedies of Purchaser—Fraud—Action to Recover Consideration.

7. One induced by fraudulent representations to purchase land under an executory contract upon discovering the fraud may rescind the contract absolutely, and sue in an action at law to recover the consideration paid. (Kruse v. Bush, 394.)

Vendor and Purchaser—Fraud—Recovery of Purchase Money.

8. In the absence of fraud or some other ground for rescission, the purchaser cannot escape his contract obligation or recover back the purchase money paid, though the rule is otherwise where the purchaser is entitled to rescind. (Kruse v. Bush, 394.)

Vendor and Purchaser—Fraud—Rescission—Time.

9. Where a purchaser and his assignee might disaffirm an executory contract of sale for fraudulent representations, they were required to do so promptly on discovery of the fraud. (Kruse v. Bush, 394.)

Vendor and Purchaser—Fraud—Action to Recover Consideration—Right of Assignee.

10. Where a purchaser under an executory contract elected to rescind on the discovery of the vendor's fraudulent representations and quitclaimed the property to defendant and demanded a repayment of the money paid on the contract, she became entitled to sue for money had and received, and such claim might be asserted by her assignee. (Kruse v. Bush, 394.)

Vendor and Purchaser—Remedies of Purchaser—Action to Recover Consideration—Instruction.

11. In an action by a purchaser's assignee for money paid under an executory contract of sale rescinded on the ground of the vendor's fraudulent representations, an instruction that plaintiff need not prove all the alleged representations to be false, and that it was sufficient to prove that a single representation was false, that the fraud, as defined by the instruction, must be clear and convincing, was not objectionable as permitting the jury to find for plaintiff if the alleged representations were fraudulent in a single respect, even though the falsity was inconsequential. (Kruse v. Bush, 394.)

Vendor and Purchaser—Remedies of Purchaser—Recovery of Consideration.

12. Plaintiff was not required to show a total failure of consideration. (Kruse v. Bush, 394.)

VERDICT.

In Action for Joint Tort.

See Appeal and Error, 22.
See Trial, 11, 12.

WAIVER.

See Contracts, 5, 6.
See Indians, 1, 2.
See Partnership, 3.
See Pleading, 1.

WARRANTIES.

See Sales, 6.

WATERS AND WATERCOURSES.

Waters and Watercourses—Appropriation—Rights—Quantity of Water.

1. One entitled to a certain amount of water by appropriation is entitled to have this amount measured at the headgate of his lateral or service ditch, and not at the point of diversion from the stream, especially where these points are two miles apart, since in such case seepage and evaporation of water between these points would be considerable. (In re Althouse Creek, 224.)

Waters and Watercourses—Appropriation—Action to Determine Rights—Decree Apportioning Water.

2. Under Section 6668, L. O. L., as to when water shall be appurtenant to land for irrigation purposes, a decree determining appropriation rights may apportion the water to a definite number of specified acres, for the purpose of making a record of the right and for the purpose of regulating the exercise of the right so as to economize water and prevent waste. (In re Althouse Creek, 224.)

WILLS.

Wills—Validity—What Law Governs.

1. Ordinarily a will's validity is determined by the law of the testatrix's domicile. (Hollister v. Hollister, 316.)

Wills—Powers—Execution.

2. Under the New York law, a residuary clause in a will executes a power to dispose of personalty by will, especially as Laws N. Y. 1897, Chapter 417, Section 6, makes personalty embraced in a power to bequeath pass by a will purporting to pass all the personalty, unless a contrary intent is manifest. (Hollister v. Hollister, 316.)

Wills—Ambulatory Character and Revocability.

3. The provisions of a will are subject to change at any time before the death of the testator by making a new will or codicil or by a sale of the property devised or bequeathed or by consuming and destroying it. (In re Wilson's Estate, 604.)

Wills—Rights of Legatee of Stock.

4. A legatee of shares of stock takes the stock as it was at the time of the testator's death. (In re Wilson's Estate, 604.)

Wills—Specific or General Bequest.

5. A bequest of all the stock in a corporation "which I may own at the time of my death" is a specific bequest. (In re Wilson's Estate, 604.)

Wills—Time from Which Will Speaks.

6. A will speaks only from the death of the testator, unless a contrary intention is manifested from the language of the will or its provisions. (In re Wilson's Estate, 604.)

Wills—Bequest of Stock—Effect of Division of Profits.

7. A testator who with another owned all the stock of the corporation bequeathed his stock in the corporation in trust for certain parties, giving his residuary estate to other parties. After the execution of the will the corporation made a sale of property and the two stockholders divided the proceeds of the sale between themselves, and thereafter treated the fund so received as their own. *Held*, that the fund so received by the testator was his property and the property of his estate, and to be distributed in accordance with the will as property of his estate, and not restored to the corporation in order that it might inure to the benefit of the legatee of the stock. (In re Wilson's Estate, 604.)

See Courts, 1.
See Powers, 1, 2.

WITNESSES.

Witnesses—Declarations of Decedent—Plaintiff as Witness to Declarations—Statute.

1. Plaintiff was entitled to testify to decedent's declarations under Section 732, L. O. L., specifying persons who cannot testify. (Tharp v. Jackson, 78.)

Witnesses—Action Against Administratrix—Declarations of Decedent —Admissibility.

2. Plaintiff's testimony as to decedent's declarations made the declarations admissible on behalf of defendant administratrix. (Tharp v. Jackson, 78.)

Witnesses—Inconsistent Statements—Cross-examination.

3. In action on accident indemnity policy, the president's written report of accident and plaintiff's answer in suit by injured employee were admissible on cross-examination, in view of Section 860, L. O. L., providing that the adverse party may cross-examine as to any matter stated in or connected with the direct examination, and Section 864, providing that a witness may be impeached by evidence that he has made at other times statements inconsistent with present testimony, and if such statements be in writing they shall be shown to the witness, and Section 711, providing that when part of an act, declaration, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other party, and when a detached act, etc., is given in evidence, any other act necessary to make it understood may also be introduced, where plaintiff's witnesses testified as to the details of the accident, and had introduced in evidence the injured employee's complaint, which was a detached writing, for the proper explanation of which the admission of the answer was necessary. (Western W. Co. v. New Amsterdam C. Co., 597.)

Witnesses—Cross-examination—Effect.

4. Cross-examination of a witness is part of the case of the party for whom he testifies, and the court is authorized to consider papers admitted on cross-examination as part of plaintiff's case in chief, and to draw conclusions of fact therefrom. (Western W. Co. v. New Amsterdam C. Co., 597.)

Witnesses—Cross-examination—Matter not Covered by Direct Examination—Bulk Sales Law.

5. Where a witness testified only to a sale between himself and plaintiff's bankrupt, he could not be cross-examined as to compliance with the Bulk Sales Law as amended, in view of Section 860, L. O. L., confining cross-examination to matters stated in direct examination, since noncompliance therewith did not affect the transfer as between the parties the "orthodox rule," extending cross-examination to every issue in the case, not being in force in this state; but such cross-examination could include all elements going to make up the transaction as between the parties, such as circumstances of sale, payment of consideration, time and place. (Benson v. Johnson, 677.)

Allowance of Witness' Fees.

See Costs, 3.

Credibility of Witnesses.

See Jury, 1.

Failure to Produce Witness.

See Evidence, 3.

WORDS AND PHRASES.

"Actual fraud"—See Farrell v. Davis, 213.
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"All measures"—See Colby v. City of Medford, 485.
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"Contract"—See Colby v. City of Medford, 485.
"Denouncement"—See Stewart v. King, 14.
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"General election"—See Bethune v. Funk, 246.
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"Interest"—See Colby v. City of Medford, 485.
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"Reasonably safe"—See Emerson v. Portland E. & E. R. Co., 229.
"Servant"—See Houston v. Keats Auto Co., 125.
"Suit on a contract"—See Rogue River Assn. v. Gillen-Chambers Co., 113.
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Safe Place to Work.
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